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# Domestic Violence and State Intervention in the American West and Australia, 1860-1930

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# Domestic Violence and State Intervention in the American West and Australia, 1860–1930<sup>†</sup>

CAROLYN B. RAMSEY\*

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*This Article calls into question stereotypical assumptions about the presumed lack of state intervention in the family and the patriarchal violence of Anglo-American frontier societies in the late nineteenth and early twentieth centuries. By analyzing previously unexamined cases of domestic assault and homicide in the American West and Australia, Professor Ramsey reveals a sustained (but largely ineffectual) effort to civilize men by punishing violence against women. Husbands in both the American West and Australia were routinely arrested or summoned to court for beating their wives in the late 1800s and early 1900s. Judges, police officers, journalists, and others expressed dismay over domestic assaults. However, legal authorities struggled with the dilemma of how to deter batterers whose victims were reluctant to prosecute. To be sure, the state’s response was not as aggressive as under modern mandatory arrest laws and no-drop prosecution policies. Yet the “why didn’t she leave?” question actually may have seemed easier to answer in the late 1800s and early 1900s than it did later in the twentieth century. Due to the failure of the state to prevent recidivist domestic violence, juries and even judges often deemed the actions of women who killed their abusive husbands wholly or partially justified. In contrast, husbands who killed their wives tended to be convicted of murder because their crimes violated the ideal of the “respectable family man” that was vital to the efforts of both the American West and Australia to project a civilized image.*

*This Article makes three contributions. First, it presents a complex and surprising picture of gender relations in the American West and Australia by*

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\* Associate Professor of Law, University of Colorado Law School. I would like to thank George Fisher, Caroline Forell, Aya Gruber, Jeannie Suk, and Deborah Tuerkheimer for helpful suggestions. This Article also benefitted from being presented in draft form at the 2009 American Society for Legal History Annual Meeting and the 2010 Law and Society Association Conference. Nicole Cedar, Pam Do, Jessie Freer, Jenny McDonald, and Melissa Segers provided excellent research assistance.

showing that men punished other men for physically attacking their wives and that there was greater public concern about violent marriages than scholars have realized. Second, it documents the criminal prosecution of wife beaters and wife killers on two continents during a seventy-year period, which indicates that this was not just an isolated peak of intervention in a long history of apathy toward domestic violence. Third, Professor Ramsey shows that scholarly emphasis on women's insanity claims has obscured the extent to which female defendants successfully raised self-defense arguments to obtain acquittal or mitigation in intimate-partner murder cases. The justification of abused women's use of deadly force acknowledged the desperate circumstances they faced in societies that condemned domestic violence, but had neither succeeded in deterring it, nor provided victims with adequate escape routes.

#### INTRODUCTION

In the second half of the nineteenth century, both the American West and Australia were frontier regions seized from indigenous populations and settled by waves of immigrants, some of whom came to strike it rich in the goldfields.<sup>1</sup> Both conjure images of stereotypically masculine men—the miner, the Indian fighter, the cowboy, the sheep-shearer—whose characters were forged in a hostile wilderness. According to the classic account, the frontier produced rugged American individualism in a landscape where women were subordinated and practically invisible.<sup>2</sup> Frederick Jackson Turner's famous Frontier Thesis "used ruggedness as a euphemism for exceptional capacity for force and violence"<sup>3</sup> and assumed the "individual" was male.<sup>4</sup> In Australia, "[m]ateship" is thought to have emerged from the brutal convict era as an exclusively male form of camaraderie that reinforced patriarchy and perpetuated the sexual objectification of women.<sup>5</sup> The American frontiersman and the hard-drinking "Lone Hand" of the Australian bush, who lacked family duties but not sex, became cultural heroes while most men in both places settled into married life.<sup>6</sup> If such images of hypermasculinity are taken at face value, however, they lead to a stock narrative of social acceptance and even

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1. See John Braithwaite, *Crime in a Convict Republic*, 64 MOD. L. REV. 11, 16–17 (2001).

2. See Joan M. Jensen & Darlis A. Miller, *The Gentle Tamers Revisited: New Approaches to the History of Women in the American West*, in WOMEN AND GENDER IN THE AMERICAN WEST 9, 10–11 (Mary Ann Irwin & James F. Brooks eds., 2004) (describing the insignificance of women in Frederick Jackson Turner's Frontier Thesis).

3. JOHN PETTEGREW, BRUTES IN SUITS: MALE SENSIBILITY IN AMERICA, 1890–1920, at 39 (2007).

4. See *id.* at 23.

5. See Braithwaite, *supra* note 1, at 42.

6. Marilyn Lake, *The Politics of Respectability: Identifying the Masculinist Context*, 22 HIST. STUD. 116, 120–21 (1986); see Dee Garceau, *Nomads, Bunkies, Crossdressers, and Family Men: Cowboy Identity and the Gendering of Ranch Work*, in ACROSS THE GREAT DIVIDE: CULTURES OF MANHOOD IN THE AMERICAN WEST 149, 152, 165 (Matthew Basso, Laura McCall & Dee Garceau eds., 2001) (noting that cowboys attained hero status as more men became land-owning ranchers with wives and families).

approval of violence against women that is not supported by historical evidence. This Article's analysis of intimate-partner assault and homicide cases reveals that the reality in the American West and Australia was much more complicated. The research presented here does not challenge empirical findings about high rates of domestic violence in frontier societies.<sup>7</sup> Instead, it sheds new light on the role of police, courts, juries, and the press in condemning such violence and demonstrates that, even on the frontier, the nineteenth- and early twentieth-century home was less private than leading scholars assume.<sup>8</sup>

Western American states and territories wanted to attract female settlers, curb drinking and other vices, and make a bid for civility; hence, temperance campaigns were paired not only with woman suffrage and the expansion of legal opportunities for divorce, but also with the criminal prosecution of wife beating and wife murder. For somewhat similar reasons, Australian men also punished other men for engaging in domestic violence. As Australians sought to shed their convict past, their desire to display respectability through protectiveness toward women led to denunciation of intimate-partner assaults and homicides perpetrated by men, though the criminal sentences actually imposed were often less severe in Australia than in the American West. The demise of the right to inflict corporal punishment on one's wife was increasingly associated with the values of a rising elite. Because

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7. See, e.g., RANDOLPH ROTH, *AMERICAN HOMICIDE* 275 (2009) ("The Southwest had by far the worst rates of marital homicide in the second half of the nineteenth century."). Roth states, however, that "family and intimate homicide rates remained low relative to the rates for unrelated adults" throughout the nineteenth century, though they began to increase in the late 1820s and 1830s. *Id.* at 250.

8. It is an often-repeated orthodoxy among scholars of domestic violence that, historically, society and the state accepted and even encouraged wife beating and other forms of intimate-partner abuse. See ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 5–6 (1987) (stating that "lack of concern about the issue [of family violence] has been the normal state of affairs" in American history); ELIZABETH M. SCHNEIDER, CHERYL HANNA, JUDITH G. GREENBERG & CLARE DALTON, *DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE* 13 (2d ed. 2008) ("When women were viewed as inferior to men, needing to be instructed by men, what we now call domestic violence was simply seen as an appropriate part of that instruction."); *id.* at 274 ("Historically, the criminal justice system has been characterized by its chronic inattention to domestic violence."); Reva Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2119–20 (1996) (contending that, after the Civil War, judges asserted that the criminal justice system should respect the privacy of middle- and upper-class families by not prosecuting wife beaters); see also, e.g., JEANNIE SUK, *AT HOME IN THE LAW* 13 (2009) ("For much of our history, DV [domestic violence] was generally outside the reach of the criminal law. . . . Although wife beating was formally illegal in all U.S. states by 1920, it was not until the 1970s that efforts by the women's movement to recast DV as a public concern began to succeed."); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 *IOWA L. REV.* 1253, 1269 (2009) ("Historically, spousal violence was exempted from state intervention and criminal prosecution."); Emily Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 *WIS. L. REV.* 1657, 1666 ("For all of our history, until approximately twenty-five years ago, the criminal justice system did not recognize domestic violence as an issue of concern, much less focus on methods to attack it.").

some Australian males, especially in the working class, continued to resist companionate marriage as an undesirable British import, the ideal of the “respectable family man” may not have gotten a firm foothold in Australia until the early twentieth century.<sup>9</sup> But even in the 1800s, criminal cases reveal the beginnings of an effort to civilize Australia by policing violence against women.

“Statehood” and “nationhood” are used in this Article to refer to the creation of a respectable society according to late Victorian cultural standards. These terms do not literally refer to the moment that California or any other western region became a state or the moment Australia became a nation. Rather, the aspiration toward civility continued long after the granting of these official designations. By the 1920s, of course, Los Angeles had become the locus of the glamorous new film industry,<sup>10</sup> and in Australia, suburbs had sprouted around the urban centers of Sydney and Melbourne.<sup>11</sup> But for much of the period covered by this Article, both the American West and Australia struggled to establish a refined identity, which led to intolerance for domestic violence against women.

This Article unfolds in two Parts. Part I analyzes the legal treatment and public views of men’s physical attacks on women in the American West and Australia in the second half of the nineteenth century and the early decades of the twentieth. The analysis presented here is not quantitative; it is virtually impossible to know how many women were beaten or killed, or even how many men were prosecuted, as only sparse records survive. Rather, this Article relies on extant criminal case files, sentencing records, and newspaper accounts of murder trials, as well as on routine press coverage of police and local court proceedings involving domestic assault and battery. Hence, it offers a rich (though admittedly incomplete) picture of public responses to men’s violence against female intimates. After providing social and demographic background, it explores nonfatal domestic assaults and attempted murder cases in an effort to understand the state’s failure to prevent recidivist batterers from murdering their spouses. Although the policies of courts and the police were ineffective, these policies nonetheless show a greater degree of state intervention and denunciation of battering than most scholars have recognized. Moreover, substantial continuity in the treatment of such cases past 1900 suggests that historians have placed too much emphasis on the supposed decriminalization of domestic violence during the Progressive Era.<sup>12</sup>

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9. See Lake, *supra* note 6, at 130.

10. See, e.g., ROBERT SKLAR, *FILM: AN INTERNATIONAL HISTORY OF THE MEDIUM* 98 (1993) (“By 1920 probably a majority of United States feature films were produced in Hollywood [or environs] . . .”).

11. See, e.g., Seamus O’Hanlon, *Cities, Suburbs and Communities*, in *AUSTRALIA’S HISTORY: THEMES AND DEBATES* 172, 180–81 (Martyn Lyons & Penny Russell eds., 2005) (suggesting that suburban living was already becoming a “mark of social respectability” for Australians by the 1880s and that, in the post-war twentieth century, “the detached home in the suburbs became *the* symbol of Australian achievement” (emphasis in original)).

12. See LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE*, BOSTON 1880–1960, at 21–22 (1988) (arguing that the Progressives tended to minimize and ignore domestic violence in the years 1910–1930 due to their zeal to keep families together); PLECK, *supra* note 8, at 125–26, 137 (suggesting that, in the first two decades of the twentieth century, family courts sought to decriminalize marital violence);

Part I then turns to homicide cases. Male defendants charged with killing their wives were typically convicted of murder and given prison sentences or even the death penalty in the American West and Australia. The somewhat more lenient outcomes for wife killers in Australia, compared to the American West, suggest that Australian society placed a higher value on female obedience and sobriety and, above all, the exclusion of women from the masculine sphere. Marilyn Lake cautions, “[t]o cast the struggle [for an Australian national culture] in terms of respectability and unrespectability is to miss the sexual dynamic in history.”<sup>13</sup> Yet, by the same token, an overly reductive narrative of gender warfare ignores men’s reproof of other men for abusing their marital authority. What is needed is a revised legal history of domestic violence that explores how an unstable synthesis of paternalism, Victorian respectability, and early feminist concerns, including temperance, shaped public attitudes toward spousal assaults and homicides. In the American West and Australia during the late 1800s and early 1900s, emerging cultural forces denounced forms of male violence that may previously have been ritualized and accepted. Hence, wife beaters were fined, censured, or jailed, and wife killers usually received substantial prison terms or even capital punishment.

By contrast, social change lent women’s resort to self-defensive killing heightened credibility. Part II shows that women accused of murder in the American West and Australia successfully deployed theories of justifiable homicide. Depending on the case, they could obtain acquittals or mitigation, not only by raising insanity claims, but also by convincing juries that their lethal acts were rational, justifiable responses to abuse. Although Australian women seem to have been convicted more often than their American counterparts, especially if the decedent did not pose an immediate threat, they were often acquitted on self-defense grounds when they killed during a struggle. Legal historians have paid relatively little attention to the justification of killings by women. As Part II suggests, undue emphasis on insanity claims has obscured the extent to which female defendants obtained acquittals or mitigation for self-defensive acts against violent men deemed to have transgressed the duty to honor and protect their wives.

#### I. POLICING MALE VIOLENCE AGAINST WOMEN

Women in the nineteenth-century American West and their counterparts in the Australian colonies of Victoria and New South Wales<sup>14</sup> occupied an ambivalent

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Siegel, *supra* note 8, at 2170 (contending that, by the 1920s, “[b]attered wives were discouraged from filing criminal charges against their husbands, urged to accept responsibility for their role in provoking the violence, and encouraged to remain in the relationship and rebuild it rather than attempt to separate or divorce”).

13. Lake, *supra* note 6, at 116.

14. This Article focuses on two colonies on Australia’s east coast that became the modern states of New South Wales and Victoria. I chose them, not only for their abundant historical records, but also because they have differing histories, which I initially thought might have produced contrasting approaches to intimate-partner violence. New South Wales began as a British penal colony to which convicted prisoners were transported, starting in the late eighteenth century. G.D. WOODS, A HISTORY OF CRIMINAL LAW IN NEW SOUTH WALES: THE COLONIAL PERIOD, 1788–1900, at 21 (2002). By contrast, the discovery of gold in the 1850s drove the influx of settlers to Victoria. See ROBERT HUGHES, THE FATAL SHORE 563

position. On one hand, their presence had been actively sought from the mid-1800s to remedy a gender imbalance and to import respectability. On the other hand, the prescriptive ideal of the frontier woman as “tamer” or “civilizer” existed in tension with residual views of females as sexual commodities. The respectable wife was sometimes resented and satirized as prudish and nagging, and especially in Australia, the cultural resilience of the Lone Hand as a masculine hero perpetuated the view that “[a] wife and children will put the hobbles on you.”<sup>15</sup> Generally speaking, however, companionate marriage based on the separate but reciprocal obligations of both spouses began to be established as the dominant social aspiration on America’s western frontier and in Australia during the second half of the nineteenth century.<sup>16</sup> A husband was obliged to support his wife—to provide her with food, clothing, and shelter and, while the cultural expectation of wifely obedience proved resilient, “nothing . . . required a wife to submit to cruelty or to tyranny.”<sup>17</sup> It was against this standard that men’s violence toward their female intimates was judged.

Part I tracks the arrival of the respectable family ideal in the American West and Australia. Then, using previously unexamined primary sources, it demonstrates that the criminal justice system generally reacted with disapproval, rather than empathy or apathy, toward wife beaters and wife killers.

#### *A. Social and Demographic Background*

Women’s social status derived from the changing needs they fulfilled. In the early days, men vastly outnumbered women in the American mining camps and the Australian penal colonies, which exacerbated the subordination of women as objects of sexual gratification. During the first decades of penal transportation, unmarried female immigrants to Australia were often propositioned for sex upon

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(1987). Despite their disparate origins, however, New South Wales and Victoria treated domestic homicides in remarkably similar ways. *See, e.g., infra* note 296 and accompanying text.

15. Lake, *supra* note 6, at 118 (quoting RANDOLPH BEDFORD, NOUGHT TO THIRTY-THREE 73 (1976)); *see* JUDITH A. ALLEN, SEX AND SECRETS: CRIMES INVOLVING AUSTRALIAN WOMEN SINCE 1880, at 5 (1990) [hereinafter ALLEN, SEX AND SECRETS] (commenting on the disparagement of the “wowser” wife); BRIAN ROBERTS, AMERICAN ALCHEMY: THE CALIFORNIA GOLD RUSH AND MIDDLE-CLASS CULTURE 231, 247 (2000) (describing resentment toward prudish female reformers who sought to civilize the West); *see also* ROTH, *supra* note 7, at 278 (stating that many male settlers in California “spoke disparagingly about getting tied down to women”). Even the church—an institution responsible for emphasizing the benefits of married life—sought to attract Australian men by offering its own male organizations and recreations as an escape from domesticity. Anne O’Brien, “A Church Full of Men”: Masculinism and the Church in Australian History, 100 AUSTL. HIST. STUD. 437, 449–54 (1993).

16. ROBERT GRISWOLD, FAMILY AND DIVORCE IN CALIFORNIA, 1850–1890: VICTORIAN ILLUSIONS AND EVERYDAY REALITIES 5 (1982); *cf.* ANNE SUMMERS, DAMNED WHORES AND GOD’S POLICE 359 (new ed. 1994) (noting that the stereotype of married, stay-at-home wives as “God’s police” exalted women’s moral power, but denied them economic independence and the power of self-determination).

17. HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 156 (2000); *see id.* at 154, 156–57.

arrival, whether they were convicts or free persons, and the colony's governors deemed them prostitutes if they cohabited with men.<sup>18</sup> The label of "whore" was also associated with the early female settlers of America's western frontier, despite the fact that many women came west as homesteaders or domestic servants and did not engage in sex work.<sup>19</sup> Indeed, the caricature of the American frontier woman as brothel madam lingered to compete with more wholesome images of the female helpmate and civilizer.<sup>20</sup>

The demographic situation changed in the second half of the nineteenth century. Although men outnumbered women by twenty-three to one in California in 1860, the imbalance was only two to one a decade later.<sup>21</sup> Colorado and Oregon experienced a similarly dramatic influx of females, whereas skewed gender ratios persisted in Arizona, Nevada, Wyoming, Idaho, and Montana.<sup>22</sup> By 1900, parity had nearly been achieved in some western cities; for example, Denver and Los Angeles had more than ninety-five women for every one hundred men.<sup>23</sup> The numbers of men and women in the Australian colonies of New South Wales and Victoria gradually equalized over the course of the nineteenth century, too, so that by the 1880s, an increased number of men were able to marry.<sup>24</sup> These changes arose in part from a conscious policy of civilizing the frontier by encouraging the migration of respectable women.

### 1. Settling the American West

For American miners and adventurers, many of whom came from the middle class, the way west initially offered an exciting escape from the constraints of bourgeois domesticity.<sup>25</sup> But some of these men began to long for a restoration of

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18. See SUMMERS, *supra* note 16, at 313–16; see also ALLEN, *SEX AND SECRETS*, *supra* note 15, at 4–5; PAULA J. BYRNE, *CRIMINAL LAW AND COLONIAL SUBJECT: NEW SOUTH WALES, 1810–1830*, at 39, 50, 287 (1993). Despite popular myth, no female convicts were actually sent to Australia for engaging in prostitution, which was not a transportable offense. See HUGHES, *supra* note 14, at 244; Braithwaite, *supra* note 1, at 41. The official characterization of female immigrants as either "married" or "concubine" clashed with working-class tolerance for cohabitation out of wedlock. See HUGHES, *supra* note 14, at 247.

19. See Jensen & Miller, *supra* note 2, at 15; see also Ronald M. James & Kenneth H. Fliess, *Women of the Mining West: Virginia City Revisited*, in COMSTOCK WOMEN: THE MAKING OF A MINING COMMUNITY 17, 28–29 (Ronald M. James & C. Elizabeth Raymond eds., 1998) (stating that prostitutes did not make up a large portion of the women living and working in Virginia City, Nevada, but also that they were the most likely to lie to census-takers about their occupations). *But cf.* PAULA PETRIK, *NO STEP BACKWARD: WOMEN AND FAMILY ON THE ROCKY MOUNTAIN MINING FRONTIER, HELENA, MONTANA, 1865–1900*, at 25–58 (1987) [hereinafter PETRIK, *NO STEP BACKWARD*] (discussing prostitution as a source of entrepreneurship and employment outside the home in late nineteenth-century Montana).

20. See Jensen & Miller, *supra* note 2, at 11–14.

21. *Id.* at 19.

22. See *id.*

23. *Id.* at 19, 22.

24. See Lake, *supra* note 6, at 122.

25. See SUSAN LEE JOHNSON, *ROARING CAMP: THE SOCIAL WORLD OF THE CALIFORNIA GOLD RUSH* 156 (2000) (discussing white men who indulged in the Gold Rush pleasures of



the standards they had known on the East Coast.<sup>26</sup> Social reformer and former prison matron Eliza Farnham tried to bring more than one hundred single women to Gold Rush California to become the wives of bachelor-prospectors.<sup>27</sup> Though she failed in her specific mission and was widely ridiculed for her prudery, the view that attracting “pure” females to the West would “aid in the territory’s transition to statehood, and . . . lend a veneer of respectability to the region’s rising economy” eventually gained male adherents.<sup>28</sup> Women’s Christian influence and presumptively greater moral purity was thought to make the home a refuge from the volatile, disorderly public life of the mining town. The scarcity of white females led to their idealization and to draconian efforts to protect them, as illustrated by the decree of capital punishment “for murder, thieving, or *insulting a woman*” in one Montana mining camp.<sup>29</sup>

In the late nineteenth and early twentieth centuries, western cities began to copy the tall buildings of East Coast urban centers like Manhattan, and museums, libraries, theatres, city parks, and churches began to replace the saloon as sites of community and recreation.<sup>30</sup> Religious and charitable organizations proliferated.<sup>31</sup> Most importantly, nineteenth-century moralists extolled the virtues of home life.<sup>32</sup> As the companionate ideal took root, men were judged by their conformity to idealized dual roles: a secular version of the Protestant work ethic in the business sphere and the expectation that they would show kindness and affection to their wives at home.<sup>33</sup>

## 2. The Rise of Respectable Australian Society

The colonial government of New South Wales decided by the early 1800s that female convicts ought to become wives rather than concubines.<sup>34</sup> The project in Australia was one of redemption: marriage promised to rehabilitate men and end criminal careers.<sup>35</sup> After penal transportation to New South Wales ended in 1840,

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“card playing, strong drink, easy sex, and even the license to cuss with impunity”); ROBERTS, *supra* note 15, at 263 (“Out there, middle-class men did not have to act middle-class; nor would they be crippled in doing business by a bourgeois standard of respectability.”).

26. See ROBERTS, *supra* note 15, at 255–56.

27. See *id.* at 230–33.

28. *Id.* at 255; see *id.* at 221–47 (discussing Farnham’s failed mission).

29. Jensen & Miller, *supra* note 2, at 12 (emphasis added) (discussing the origins of the image of the frontier woman as a civilizing agent). The phrase “insulting a woman” likely referred to rape or at least to unwanted sexual imposition.

30. See CARL ABBOTT, *THE METROPOLITAN FRONTIER: CITIES IN THE AMERICAN WEST*, at xviii (1993); THOMAS J. NOEL, *THE CITY AND THE SALOON: DENVER, 1858–1916*, at 113, 115 (2d ed. 1996); see also Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880–1920*, 77 U. COLO. L. REV. 101, 163–64 & nn.332, 336 (2006) [hereinafter Ramsey, *Intimate Homicide*] (describing such developments in Denver, Colorado).

31. See ABBOTT, *supra* note 30, at xviii.

32. See GRISWOLD, *supra* note 16, at 129–30.

33. *Id.* at 92.

34. See BYRNE, *supra* note 18, at 38, 41; Hilary Golder & Diane Kirkby, *Marriage and Divorce Before the Family Law Act, 1975*, in *SEX, POWER, AND JUSTICE: HISTORICAL PERSPECTIVES ON LAW IN AUSTRALIA* 152 (Diane Kirkby ed., 1995).

35. Braithwaite, *supra* note 1, at 42.

reformer Caroline Chisholm espoused the belief that women could assume the civilizing function that chaplains had performed during the convict era.<sup>36</sup> Chisholm deemed the role of women as “moral police” more necessary in Australia than in England, where respectability was better entrenched among the middle classes: “In Australia, the embryo of respectable society existed but it was necessary to protect it, and allow it to expand and perpetuate.”<sup>37</sup> To this end, Chisholm traveled to England in the 1840s to locate the wives and children of emancipated male convicts, as well as to recruit single women and entire families as settlers.<sup>38</sup> The discovery of gold in New South Wales and Victoria in the 1850s initially led to an influx of single, male adventurers and a corresponding resurgence of prostitution, which threatened Chisholm’s project.<sup>39</sup> However, the gold rush and the wool trade ultimately created the conditions for the rise of an Australian bourgeoisie.<sup>40</sup> It was only then that Australians began to claim a respectable identity of their own, rather than looking to their British roots.<sup>41</sup>

The exaltation of female purity, often associated with the Victorian era of the British Empire, was not entirely new to Australia at midcentury. Rather, popular celebration of the outlaw bushranger who challenged British authority had long contained a strand of protectiveness toward women. As folk histories recount, in the early 1820s, Matthew Brady led a notorious band of cattle-rustlers and sheep-stealers in Tasmania, but “would never harm a woman or let any of his gang do so.”<sup>42</sup> He beat and even killed associates who raped or murdered female settlers, and when he was finally hanged in 1826, “[w]omen shed tears for the ‘likely lad,’ ‘the poor colonial boy,’ who had shown such consideration to their sex.”<sup>43</sup> Several historians have documented the survival of a free-wheeling masculine ethos, resistant to Victorian social mores, at the end of the 1800s and even into the early 1900s.<sup>44</sup> Since Australian wealth derived from pastoral and mining interests,<sup>45</sup> the

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36. SUMMERS, *supra* note 16, at 347–48.

37. *Id.* at 348.

38. *See id.* This strategy was not unique to New South Wales. Indeed, Edward Gibbon Wakefield, the founder of South Australia, pursued a plan to found a colony based on equal numbers of men and women to ensure that “no woman there would be without a protector, and no man would have an excuse for dissolute habits.” *Id.* at 344 (quoting S. AUSTL. ASS’N, SOUTH AUSTRALIA: OUTLINE OF THE PLAN OF A PROPOSED COLONY 16 (London, Ridgway & Sons 1834)).

39. *See id.* at 350; Susanne Davies, *Captives of Their Bodies: Women, Law, and Punishment, 1880s–1980s*, in SEX, POWER, AND JUSTICE: HISTORICAL PERSPECTIVES ON LAW IN AUSTRALIA, *supra* note 34, at 99, 103.

40. *See* HUGHES, *supra* note 14, at 564, 571.

41. *See* SUMMERS, *supra* note 16, at 353.

42. HUGHES, *supra* note 14, at 232.

43. *Id.* at 234. The government in the penal colonies also dealt harshly with femicide. Indeed, a sample of murder cases in New South Wales from 1824 to 1840 indicates that the majority of men accused of killing their wives were convicted of murder. Carolyn B. Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform*, 100 J. CRIM. L. & CRIMINOLOGY 33, 46–47 & app. (2010) [hereinafter Ramsey, *Provoking Change*].

44. *See, e.g.,* Lake, *supra* note 6, at 122; O’Brien, *supra* note 15, at 443.

45. *See* Carolyn Strange, *Masculinities, Intimate Femicide, and the Death Penalty in*

bushranger and the Lone Hand were not mythical characters—nor, according to the tale of Matthew Brady, were they uniformly misogynistic. Yet the majority of the population had concentrated in urban areas by 1900,<sup>46</sup> and for most Australians, internalization of the ideal of civilized family life became the principal means of escaping the social stigma that divided Australia's pseudo-gentry from former convicts and their children.

### 3. Divorce, Political Rights, and Changing Expectations of Marriage

By the second half of the nineteenth century—when this study of intimate-partner violence begins—families and the prescriptive ideals governing them had begun to take root in both Australia and the American West. For Anglo men, the capacity to provide for one's family and treat one's wife as a "sacred partner" and guardian of morality supposedly divided respectable from unrespectable, white from nonwhite.<sup>47</sup> However, expectations about marital relations were undergoing further change, which produced gendered cultural tensions. The prevalence of drunkenness and itinerant labor in late nineteenth- and early twentieth-century Australian society exacerbated domestic strife and were widely blamed for wife beating and desertion.<sup>48</sup> American women also rallied around the temperance movement in an effort to change misbehaving husbands.<sup>49</sup>

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*Australia, 1890–1920*, 43 BRIT. J. CRIMINOLOGY 310, 317 (2003).

46. *See id.*

47. Karen J. Leong, *A Distinct and Antagonistic Race: Constructions of Chinese Manhood in the Exclusion Debates, 1869–78*, in *ACROSS THE GREAT DIVIDE*, *supra* note 6, at 131, 132–33 (quoting DAILY MORNING CALL (S.F., Cal.), Feb. 25, 1878); *see* Braithwaite, *supra* note 1, at 26–27 (discussing the importance of marriage to the social reintegration of convicts in Australia); *see also* GRISWOLD, *supra* note 16, at 93 (“[H]ow closely a man conformed to [a secularized version of the Protestant] work ethic helped predict how his friends and neighbors judged his worthiness as a husband.”); *cf.* Durwood Ball, *Cool to the End: Public Hangings and Western Manhood*, in *ACROSS THE GREAT DIVIDE*, *supra* note 6, at 97, 99–100 (indicating that manly self-restraint was reserved for whites because men of color were presumed to lack civility and to be innately inferior).

48. Indeed, according to Judith Allen:

‘Ill-used’ wives of drinking men who saw little to be gained by other high-minded feminist campaigns, and whose dependency made them unable to attack their men’s behaviour directly, found in temperance an indirect venue for articulation of their grievances. They could challenge husbandly behaviour under the most respectable aegis with the blessing of clergy and civil establishment.

Judith Allen, ‘Mundane’ Men: *Historians, Masculinity, and Masculinism*, 22 HIST. STUD. 617, 622 (1987) [hereinafter Allen, ‘Mundane’ Men]; *see* Lake, *supra* note 6, at 124.

49. *See* BARBARA LESLIE EPSTEIN, *THE POLITICS OF DOMESTICITY: WOMEN, EVANGELISM, AND TEMPERANCE IN NINETEENTH-CENTURY AMERICA* 102 (1981) (stating that temperance crusaders attributed wife beating and domestic strife to the abuse of alcohol); Anita Ernst Watson, Jean E. Ford & Linda White, “*The Advantages of Ladies’ Society*”: *The Public Sphere of Women on the Comstock*, in *COMSTOCK WOMEN*, *supra* note 19, at 179, 192–94 (discussing the leading role of female temperance reformers in promoting the view that drinking had a detrimental effect on Nevada families). For a brief discussion of nineteenth-century concerns about idle, drunken husbands and the role of women in Colorado’s anti-liquor movement, *see* Ramsey, *Intimate Homicide*, *supra* note 30, at 149 &

Another area of social reform was the expanded ability to escape an unsatisfactory marriage. In the United States, new laws and broad judicial interpretations of existing statutes made fault-based divorce attainable. By 1857, appellate decisions in California had expanded divorce on grounds of cruelty to include “mental cruelty,” such as false accusations of adultery.<sup>50</sup> In 1870, the legislature adopted this change statutorily—a move largely attributable to the rise of companionate marriage and married women’s elevated moral stature.<sup>51</sup> Similar legal developments occurred in Nevada in the 1860s,<sup>52</sup> Montana in the 1880s, and Wyoming in the 1890s.<sup>53</sup> Although the ideal of companionate marriage may have originated with the bourgeoisie, more than half of the divorce petitioners who asserted violations by misbehaving spouses in late nineteenth-century California came from the skilled and unskilled laboring classes.<sup>54</sup> Australia’s divorce rate remained low compared to that in the United States because Australian laws “did not allow divorce on the single and ‘elastic’ ground of cruelty” until somewhat later.<sup>55</sup> Yet, starting in the 1880s, a woman in New South Wales or Victoria could divorce her husband for physically assaulting her, as well as if he committed adultery, got sent to prison, or was habitually drunk and cruel.<sup>56</sup> By 1892, courts in New South Wales considered cruelty alone a sufficient ground for divorce.<sup>57</sup>

There was an acknowledged connection between wife beating and the necessity of making it easier for women to leave violent marriages. Indeed, in both Australia and the American West, the extension of divorce reflected increased recognition by legal authorities that abused women should have a better avenue for escape than the criminal courts. Australian judge Sir Alfred Stephen believed, for example, that “prosecution was no solution for women compelled to reside with and be supported by their assailants.”<sup>58</sup>

The cultural emphasis on women’s moral purpose first “increased [their] status at home but [later] expanded the acceptable limits to women’s activity in society.”<sup>59</sup> Campaigns for voting rights and equal employment opportunities, in addition to temperance and education reform, paralleled the extension of divorce. Significantly, many suffragists in the American West couched their arguments for the vote in the language of companionate marriage, arguing “that women should vote because their moral perspective and domestic responsibilities allied them with

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n.248.50. See GRISWOLD, *supra* note 16, at 19–20.51. See *id.* at 20.52. Kathryn Dunn Totten, “*They Are Doing So to a Liberal Extent Here Now*”: Women and Divorce on the Comstock, 1859–1880, in COMSTOCK WOMEN, *supra* note 19, at 74, 78–79.53. PETRIK, NO STEP BACKWARD, *supra* note 19, at 106–12; Paula Petrik, *Send the Bird and Cage: The Development of Divorce Law in Wyoming, 1868–1900*, 6 W. LEGAL HIST. 153, 154–55, 169–70 (1993) (noting that the ideal of companionate marriage was slow to arrive in Wyoming).54. GRISWOLD, *supra* note 16, at 25.55. Golder & Kirkby, *supra* note 34, at 164.56. *Id.* at 159.57. ALLEN, SEX AND SECRETS, *supra* note 15, at 50.58. *Id.* at 49.59. GRISWOLD, *supra* note 16, at 15.

those anxious to ameliorate the problems of an increasingly complex world.”<sup>60</sup> Similarly, according to Australian feminists in the 1880s and 1890s, giving women the vote would spread the influence of women’s humane and civilizing qualities: “In advocating this, the feminists were restating Caroline Chisholm’s theory of women’s mission which had formed one of the fundamental bases of the Australian family.”<sup>61</sup>

The frontier regions discussed in this Article granted women political rights comparatively early. By the end of the nineteenth century, women could vote in four western American states.<sup>62</sup> California granted woman suffrage in 1911,<sup>63</sup> and Arizona, Kansas, Montana, Nevada, Oregon, and Washington followed suit by 1914, six years prior to the ratification of the Nineteenth Amendment to the United States Constitution.<sup>64</sup> The newly federated Commonwealth of Australia allowed all white women to vote by 1902.<sup>65</sup>

The right and obligation of women to serve on juries might seem like a natural corollary of suffrage; yet, throughout the period covered by this Article, criminal trial juries remained predominantly, if not exclusively, male. The western United States pioneered female jury service, as it had voting rights, in an express attempt to counteract frontier violence and lawlessness.<sup>66</sup> However, because there was a

60. PETRIK, NO STEP BACKWARD, *supra* note 19, at 115 (quoting JULIE ROY JEFFREY, FRONTIER WOMEN: THE TRANS-MISSISSIPPI WEST, 1840–1880, at 194 (1979)).

61. SUMMERS, *supra* note 16, at 408.

62. These states were Wyoming, Colorado, Idaho, and Utah. See Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 913–14 (2001).

63. See *In re Mana*, 72 P. 986 (Cal. 1918) (“By an amendment of our Constitution, October 10, 1911 (art. II, § 1), women were given the right to vote and hold office.”).

64. Amar, *supra* note 62, at 913.

65. Prior to Federation, Western Australia and South Australia were the first colonies to take that step, granting woman suffrage in the late nineteenth century; New South Wales and Victoria gave females the right to vote in 1902 and 1908, respectively. See AUSTL. GOV’T, DEP’T OF FAMILIES, HOUS., CMTY. SERV. & INDIGENOUS AFFAIRS, WOMEN IN AUSTRALIAN SOCIETY—MILESTONES—1871–1983, available at [http://www.fahcsia.gov.au/sa/women/progserv/research/Pages/wia\\_milestones\\_1871\\_1983.aspx](http://www.fahcsia.gov.au/sa/women/progserv/research/Pages/wia_milestones_1871_1983.aspx) [hereinafter WOMEN IN AUSTRALIAN SOCIETY].

66. See Joanna L. Grossman, *Women’s Jury Service: Right of Citizenship or Privilege of Difference?*, 46 STAN. L. REV. 1115, 1135–36 (1994). At least five frontier states allowed mixed juries by 1920, with Utah leading the way in 1898. See Grace Elizabeth Woodall Taylor, *Jury Service for Women*, 12 U. FLA. L. REV. 224, 225–26 (1959) (describing the advent of women on juries in California, Kansas, Utah, Washington, and Nevada). Although the Wyoming Territory seated its first female jurors in 1870, it made clear that such service was a revocable privilege, not a right. Indeed, women were subsequently barred from jury service there until 1950. Debora A. Person, *Wyoming Pre-Statehood Legal Materials: An Annotated Bibliography—Part II*, 7 WYO. L. REV. 333, 385–86 (2007); Taylor, *supra*, at 225–26. Women were not officially eligible to serve in Colorado until 1945, even if they occasionally helped fill the jury box in criminal cases prior to that date. See Ramsey, *Intimate Homicide*, *supra* note 30, at 103 n.8; cf. Robert W. Pepin & Laura E. Flenniken, *The Colorado Criminal Juror: A Tribute*, 26 COLO. LAW., June 1997, at 127, 127 (stating that, in 1897, an African American woman was the first woman to sit as a juror in a criminal case in Colorado).

shortage of women in the venire even after females gained eligibility to serve, the values expressed and enforced by jury verdicts in intimate-partner violence cases were largely those of men.<sup>67</sup> A similar situation existed in Australia, where gender equality with regard to jury service was not achieved until the mid-1970s.<sup>68</sup>

#### 4. Intimate-Partner Violence and Domesticated Manhood

With its double-edged implications for women, the ideal of the wife as a civilizing influence on men and society nevertheless shaped legal responses to intimate-partner violence during the period discussed in this Article. It was this ideal—and not the older right of husbands to inflict corporal punishment on disobedient wives<sup>69</sup>—that led courts and juries to condemn men for killing female intimates and to acquit women of murder.

Domesticity and respectability were not hegemonic norms. Some men staunchly resisted them. A strong counter-current in Australian society continued to claim the itinerant, beer-swilling Lone Hand as the national image at the time of Federation

67. American courts continued to uphold automatic exemptions and opt-out provisions for women in the second half of the twentieth century. *See Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (upholding the constitutionality of a state law automatically relieving women from jury service unless they voluntarily registered). In *Hoyt*, a Florida woman whom an all-male jury convicted of murdering her husband unsuccessfully challenged the automatic exclusion of females from the venire unless they voluntarily registered. *Hoyt*, 368 U.S. at 62. Few women opted to serve in western states either. *See, e.g., People v. Turner*, 269 P. 204, 205 (Cal. 1928) (noting that a California judge addressed his erroneous instructions to “*lady* and gentlemen of the jury” in a trial resulting in the manslaughter conviction of a young Indian woman (emphasis added)). However, the predominance of men on criminal juries did not inevitably lead to compassion for male defendants and severity for females—in fact, more often, it led to the reverse. *See infra* Part II.A., Part II.B, notes 363–72 and accompanying text, Part II.D.1, Part II.D.2.

68. WOMEN IN AUSTRALIAN SOCIETY, *supra* note 65; *see* Michael Chesterman, *Criminal Trial Juries in Australia from Penal Colony to Federal Democracy*, 62 LAW & CONTEMP. PROBS. 69, 80 (1999).

69. *See* HARTOG, *supra* note 17, at 151 (suggesting that, by the mid-nineteenth century, “[t]he law seemed to offer few real means for men to secure the obedience of their wives” and that even moderate chastisement of one’s wife was thought to preclude marital felicity); *see also* MARTIN J. WIENER, *MEN OF BLOOD: VIOLENCE, MANLINESS AND CRIMINAL JUSTICE IN VICTORIAN ENGLAND 151–62* (2004); *id.* at 161 (arguing that, by the mid-1800s, “[k]indly treatment of one’s wife . . . became an important qualification for full citizenship” in Britain); *cf.* Siegel, *supra* note 8, at 2129–30 (acknowledging the formal abrogation of the common-law right of chastisement in legal treatises and judicial opinions by the 1870s). Although some men maintained that a right of chastisement continued to exist in nineteenth-century Australia, *see infra* note 271 and accompanying text, a well-known treatise omitted wife beating from the examples of domestic correction that did not constitute criminal battery. *See* JOHN HUBERT PLUNKETT & WILLIAM HATTAM WILKINSON, *PLUNKETT’S AUSTRALIAN MAGISTRATE* 23 (1860) [hereinafter *PLUNKETT & WILKINSON* (1860)]. Even during Australia’s convict era, the government generally did not impose corporal punishment on females; “the moral decision to imprison women rather than physically beat them was made,” which contrasted dramatically with the frequent use of the lash on men. BYRNE, *supra* note 18, at 278.

in 1901.<sup>70</sup> The American pattern might be better characterized as “devolution” from domestic ideals. At the end of the nineteenth century, robust physicality, ambition, and sexual drive began to replace Victorian self-restraint as the prevalent masculine standard in the United States, though this shift was delayed on the western frontier due to the late settlement of families there.<sup>71</sup> In any case, men’s frustration with their failure to live up to prescriptive ideals of respectability, sobriety, and socioeconomic success contributed to marital and other intimate-partner homicides.<sup>72</sup> As women increasingly vied for economic and political independence, the incidence of domestic violence actually may have increased in the American West and Australia.<sup>73</sup>

However, during the late nineteenth century and the first few decades of the twentieth, the public legal response to intimate-partner assaults and homicides in both regions embodied the view that husbands ought to protect their wives and refrain from using violence against them. When men failed to live up to these prescriptive norms, state-imposed punishment and even self-defensive killings were considered justified.

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70. See Lake, *supra* note 6, at 118–21 (discussing masculinist Australian literary culture around the turn of the century); *id.* at 130 (“Masculinity was defined in terms of responsible breadwinning [by the 1920s].”).

71. See Ball, *supra* note 47, at 99; Ramsey, *Intimate Homicide*, *supra* note 30, at 124–25, 148 (noting the emergence of a new masculine ideal around the turn of the century); *id.* at 160, 163 (discussing companionate marriage’s late arrival to the American West). David Peterson del Mar points out that there was a difference between the new, violent male literary hero and the actual behavior of American men, though he also contends that intimate-partner violence against women began to increase in the 1920s. See DAVID PETERSON DEL MAR, *BEATEN DOWN: A HISTORY OF INTERPERSONAL VIOLENCE IN THE WEST* 134 (2002) [hereinafter PETERSON DEL MAR, *BEATEN DOWN*].

72. See Ramsey, *Intimate Homicide*, *supra* note 30, at 175; see also ROTH, *supra* note 7, at 259.

73. See PETERSON DEL MAR, *BEATEN DOWN*, *supra* note 71, at 123–30 (arguing that violence against wives increased as they became more independent, refused to be deferential, fought back, or sought a divorce); ROTH, *supra* note 7, at 11 (“In the nineteenth century long-term changes in relations between women and men produced an increase in marital and romance homicides that has persisted to this day.”); see also Jeffrey S. Adler, “My Mother-in-Law Is to Blame, but I’ll Walk on Her Neck Yet”: *Homicide in Late Nineteenth-Century Chicago*, 31 J. SOC. HIST. 253, 258 (2001) (stating that domestic homicide rates skyrocketed at the end of the nineteenth century). Judith Allen suggests that, as the “new” Australian woman of the early twentieth century exercised her increased ability to divorce and support herself through employment, “estrangement was becoming a prediction for husbands slaying their wives, and against women slaying [their] husbands.” ALLEN, *SEX AND SECRETS*, *supra* note 15, at 127. Of course, as the numbers of men and women reached parity in Australia and the American West, there may simply have been more opportunities to engage in domestic violence.

*B. The Response of Police and Courts to Nonfatal Domestic Violence*

The historical unwillingness of police and courts to interfere in intimate-partner violence has been overstated.<sup>74</sup> Homicides occurred in the late nineteenth and early twentieth centuries, as they do today, in part because state efforts to discourage beatings and to prevent the escalation of violence proved ineffectual. However, my research shows that police officers in the American West and Australia arrested abusive spouses, with and without the victim's complaint, and that victims could also initiate criminal cases by applying to the magistrate for a summons.<sup>75</sup> Most importantly, contrary to accepted feminist narratives about the privacy doctrine's tacit endorsement of wife beating,<sup>76</sup> both legal authorities and the press condemned domestic violence.

To summarize my research findings presented in Part I.B: Defendants were brought to police court on charges of assaulting, battering, or attempting to murder their female intimates in numbers about equal to those for assaults involving

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74. See GORDON, *supra* note 12, at 280–81 (suggesting that the police were not helpful when responding to domestic violence calls because they identified with the husband's interest); PLECK, *supra* note 8, at 142 (noting "the police courts' dismissal of the seriousness of family violence"); Lake, *supra* note 6, at 124 ("[P]olice [in colonial Australia] were reluctant to prosecute, [and] judges and magistrates frequently condoned a man's violence towards his wife on the grounds that the woman had not fulfilled her wifely obligations or adopted a properly submissive demeanour."); see also, e.g., Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 212 (2008) ("Consistent with the general conception of domestic violence as a private matter, for many years the police refused to intervene in intimate partner abuse as they would in response to other crimes."); Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN'S L.J. 183, 190 n.33 (1997) ("History tells us that without mandatory arrest and prosecution, the police, and even prosecutors, are reluctant to take domestic violence seriously."). Admittedly, however, many modern legal scholars, criminologists, and battered women's advocates have focused on the refusal of police to respond to domestic violence calls in the second half of the twentieth century. See, e.g., Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47–49 (1992) (discussing nonarrest policies in the 1970s). In contrast, this Article only considers the role of the police from 1860 to 1930. Hence, I do not debate, and, indeed, I think it quite plausible, that police officers became less willing to assist abused women later in the twentieth century.

75. To unearth the state's treatment of nonfatal spousal assault cases in the American West, this Article primarily relies on statutory materials and articles from two California newspapers, the *Los Angeles Times* and San Francisco's *Daily Evening Bulletin*, which collectively cover 1860 to 1930. The Gale database, 19th Century U.S. Newspapers, was also searched for articles on wife beating in Arizona, Colorado, Idaho, Nevada, New Mexico, Oregon, and Utah. For journalistic views of intimate-partner violence, as well as factual information about assault cases in Australia, this Article uses Melbourne's *Argus* and the *Sydney Morning Herald*, which were highly regarded for their law reporting. See ALEX C. CASTLES, ANNOTATED BIBLIOGRAPHY OF PRINTED MATERIALS ON AUSTRALIAN LAW 1788–1900, at xx (1994) (confirming these newspapers' reputation). Copies of all cited newspaper reports are on file with the author.

76. See *supra* notes 8, 12, 74 and accompanying text.



strangers and other types of relationships.<sup>77</sup> Common and aggravated assaults came under the summary jurisdiction of Australian magistrates, whereas attempted murder and other attacks involving malice had to be tried before a jury.<sup>78</sup> A common assault conviction carried the potential for a fine or several months in jail.<sup>79</sup> By contrast, the law required several years imprisonment or service on a road gang for felony convictions,<sup>80</sup> and in such cases, the judge might also allow the victim to separate from her abusive husband, make provisions for the legal custody of the children, and order the husband to pay his wife weekly or monthly maintenance after the expiration of his prison sentence.<sup>81</sup> In summary cases, by

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77. According to Australian historian Judith Allen, for example, "Sampling police charge and summons books from Newtown Bench in the 1890s suggested that approximately half of assaults listed [in this Sydney suburb] concerned cohabiting couples." Judith Allen, *Policing Since 1880: Some Questions of Sex*, in *POLICING IN AUSTRALIA: HISTORICAL PERSPECTIVES* 208 (Mark Finnane ed., 1987) [hereinafter Allen, *Policing Since 1880*].

78. See PLUNKETT & WILKINSON (1860), *supra* note 69, at 24 (citing 9 Geo. IV, c. 31, § 27) (discussing common and aggravated assaults under summary jurisdiction); *id.* at 25–26 (citing 1 Vict., c. 85, §§ 4–5 and 16 Vict., No. 17, § 4) (discussing indictable assaults). These distinctions continued in New South Wales through the early twentieth century. See WILLIAM HATTAM WILKINSON, FREDERICK BUSHBY WILKINSON & JOHN HUBERT PLUNKETT, *THE AUSTRALIAN MAGISTRATE* 34–36 (7th ed. 1903) [hereinafter WILKINSON ET AL. (1903)] (citing Crimes Act, No. 40, 1900, ss. 493–94) (discussing common and aggravated assaults under summary jurisdiction); *id.* at 186–89 (citing Crimes Act, No. 40, 1900, ss. 32–41) (discussing indictable assaults). The Colony of Victoria used prosecution by information, rather than indictment. See HENRY FIELD GURNER, *THE PRACTICE OF THE CRIMINAL LAW OF THE COLONY OF VICTORIA* 12 (1871). Assaults accompanied by attempt to commit a felony, such as murder, had to be committed for trial. See *id.* at 35. However, Victoria's criminal code also allowed the summary adjudication of common assaults and aggravated assaults on women and children. It would be a mistake to associate summary adjudication solely with domestic violence cases, though. Rather, the Australian colonies relied heavily on paid magistrates to mete out justice summarily over a broad range of offenses, including juvenile misconduct. See ALEX C. CASTLES, *AN AUSTRALIAN LEGAL HISTORY* 373 (1982).

79. See PLUNKETT & WILKINSON (1860), *supra* note 69, at 24 (noting that the authorized penalty for common assault was a fine not exceeding £5 and, in default, imprisonment not exceeding two months). For examples of defendants receiving such sentences in Victoria in the 1860s, see *Fitzroy*, ARGUS (Melbourne, Austl.), July 17, 1866, at 6 (reporting that James Beaton was to be fined five shillings or imprisoned for twenty-one days in default of payment for beating his wife); *Miscellaneous Charges*, ARGUS (Melbourne, Austl.), June 30, 1868, Supp., at 1 ("Edward DeGrouchy, charged with insulting behaviour and brutally assaulting his wife, was fined 5s.; in default of payment, forty-eight hours' confinement."); *Wife-Beating and Assaulting a Constable*, ARGUS (Melbourne, Austl.), Nov. 18, 1862, at 6 (stating Patrick Kelly was ordered to pay a five-shilling fine, thirty shillings in damages, and a surety of £20 to keep the peace towards his wife for three months). The applicable prison term seems to have been increased to three months by the 1890s in New South Wales and probably in Victoria, as well. See WILLIAM HATTAM WILKINSON, FREDERICK BUSHBY WILKINSON & JOHN HUBERT PLUNKETT, *THE AUSTRALIAN MAGISTRATE* 38 (6th ed. 1894) [hereinafter WILKINSON ET AL. (1894)].

80. See PLUNKETT & WILKINSON (1860), *supra* note 69, at 26.

81. See WILKINSON ET AL. (1894), *supra* note 79, at 166, 272; WILKINSON ET AL. (1903), *supra* note 78, at 195.

contrast, a fine or a bond to keep the peace for a specified amount of time might be imposed in lieu of incarceration.<sup>82</sup> Summary adjudication with correspondingly less severe punishments was also common in the American West, as my analysis of nonlethal domestic violence cases in California will show. However, California wife beaters often spent a couple of months in jail, and they might be sentenced to several years in prison for using a deadly weapon.<sup>83</sup>

Although both men and women appeared as defendants in intimate-partner assault cases,<sup>84</sup> wife beaters overwhelmingly predominated in both regions, and the cases crossed class lines to implicate otherwise respectable families. Those punished for wife beating included wealthy men and members of the clergy,<sup>85</sup> as well as the working class and the chronically unemployed.<sup>86</sup> In contrast to

82. PLUNKETT & WILKINSON (1860), *supra* note 69, at 24–25 (discussing the penalties for common and aggravated assaults under summary jurisdiction); WILKINSON ET AL. (1903), *supra* note 78, at 34, 36.

83. *See infra* notes 115, 118–23 and accompanying text.

84. *See infra* notes 135–38 and accompanying text (discussing cases of husband beating). For discussion of California courts' flippant attitude toward husband-beating cases, *see infra* notes 136–37 and accompanying text.

85. *See Assaulting a Wife*, ARGUS (Melbourne, Austl.), Sept. 21, 1866, at 7 (reporting that defendant Thomas G. Buckley “was a man respectably dressed”); *Fried Potatoes as a Dressing for the Hair*, DAILY EVENING BULL. (S.F., Cal.), July 6, 1875, at col. A (stating that a clergyman was fined \$150, and would be sentenced to prison in default of payment, for throwing a plate at his wife and rubbing food in her hair); *Lawyer Shaw Guilty of Wife-Beating*, L.A. TIMES, Oct. 25, 1901, at 10 (reporting that a lawyer was convicted of battery on his wife); *Untitled*, ARGUS (Melbourne, Austl.), Feb. 5, 1868, at 5 (stating that Australian defendant John Highfield was reputedly “a man of money”); *Untitled*, ARGUS (Melbourne, Austl.), Jan. 27, 1868, at 5 (noting that a man required to post a peace bond after he threatened to kill his wife was “a respectable well-to-do farmer, owning between one and two hundred acres of land”); *Untitled*, ARGUS (Melbourne, Austl.), Nov. 23, 1860, at 5 (“From what was stated in court, it appeared the defendant [John Henderson] was possessed of considerable property . . .”); *see also* *People v. Griffith*, 80 P. 68, 70 (Cal. 1905) (noting that the victim and her husband, who was convicted of assaulting her with a deadly weapon, were “people of wealth”); *Continuance Won in Wife-Beating Case*, L.A. TIMES, Feb. 9, 1927, at 17 (reporting that the president of a drilling company was to be tried for wife beating); *Riverside County Affairs*, L.A. TIMES, Sept. 23, 1900, at 15 (“W.S. Gibbs a man of means and gentleman of leisure, was placed under arrest this morning . . . to answer to the charge of beating his wife.”); *The Minor Courts: A Wealthy Farmer Charged with Wife-Beating—Other Cases*, MORNING OREGONIAN (Portland), Apr. 12, 1894, at 10 (reporting that a wealthy Oregon farmer charged with wife beating was released on bail pending grand jury proceedings).

86. For examples of working-class defendants, some of whom were racial minorities, *see A Sailor Canes His Wife*, DAILY EVENING BULL. (S.F., Cal.) Dec. 7, 1882, col. F, at 3 (reporting that sailor was sentenced to pay a fine of \$50 for attacking his wife with a cane); *Brute Escapes Easily*, L.A. TIMES, July 2, 1907, at I12 (reporting a sixty-day jail term for a “barber who committed a brutal assault on his wife”); *For Wife Beating*, L.A. TIMES, Aug. 22, 1905, at I17 (noting the arrest of a stonemason for wife beating); *He Got Off Easy*, L.A. TIMES, Aug. 2, 1900, at I10 (stating that a former fireman was sentenced to six months in county jail for assaulting his wife with a deadly weapon); *Ocean Park*, L.A. TIMES, Oct. 5, 1907, at I18 (noting that a “colored” chef pleaded guilty to battering his wife); *Wife Beater*

Australia, the outcomes of the American cases varied widely according to the sex of the offender. Whereas wife beaters were sternly censured and punished, the few husband beaters who appeared in court generally went free. Indeed, a man who “allowed” his wife to batter him presented an object of ridicule.<sup>87</sup>

The severity of men’s attacks on female intimates ranged from those done with intent to kill and/or with deadly weapons, which were punished by imprisonment,<sup>88</sup> to incidents perceived to be minor, such as a husband “threatening to assault and beat his wife.”<sup>89</sup> In cases that did not involve the use of a weapon or evidence of malice, courts often imposed noncustodial sentences, simply fining defendants or ordering them to post sureties to keep the peace for a specified number of months. Men were occasionally discharged on a mere promise to behave better or to abstain from liquor.<sup>90</sup>

Recidivism was common, and some wife beaters subsequently appeared as murder defendants accused of killing their terrorized spouses.<sup>91</sup> However, the failure of prevention was not the product of societal apathy in either the American West or Australia in the late 1800s and early 1900s. The press in both places described nonlethal assaults by husbands on wives in strong terms of blame and disapproval: “shameful,”<sup>92</sup> “bestly,”<sup>93</sup> “savage,”<sup>94</sup> “a brutal outrage,”<sup>95</sup> and “an

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*Jailed*, L.A. TIMES, May 31, 1925, at G10 (indicating that a Hispanic dairyman, Frank Nunez, received a six-month jail sentence for wife beating). Unemployed men, many of them drunks, also appeared in court for wife beating. *See, e.g., A Husband’s Threats*, DAILY EVENING BULL. (S.F., Cal.), Feb. 22, 1890, at 3 (noting that a male defendant charged with threatening his wife’s life was also alleged to be “a shiftless man, unwilling to work”); *Assault*, ARGUS (Melbourne, Austl.), Feb. 6, 1862, at 6 (noting that the victim “was a hard working woman, and supported the prisoner by her labour”).

87. *See infra* notes 136–37 and accompanying text (discussing judges’ contempt for beaten husbands).

88. *See infra* note 123 (discussing the penalty for assault with a deadly weapon), notes 147–52 and accompanying text (describing the *Arnold* case, which resulted in a conviction for assault with a deadly weapon), and Part I.B.2 (discussing cases of attempted murder or assault with intent to kill).

89. *Proceedings in Police Court*, DAILY EVENING BULL. (S.F., Cal.), Nov. 9, 1869, at col. F.

90. *See, e.g., Dismissed on His Promise*, DAILY EVENING BULL. (S.F., Cal.), Mar. 3, 1869, at col. D (reporting that defendant’s wife “consented to a dismissal of the complaint” after defendant promised “never to strike his wife again” and “that he would take the pledge of abstinence from the use of intoxicating drinks”); *Proceedings in Police Court*, *supra* note 89, at col. F (stating that defendant was “dismissed on his promise to treat her better for the future”).

91. *See infra* Part I.B.4.

92. Untitled, ARGUS (Melbourne, Austl.), June 17, 1864, at 5 (discussing the case of James Tierney, in which “it seemed that . . . the prisoner had abused [his wife] in a shameful manner, and that he had been in the habit of doing so”).

93. *A Wife Beater*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Nov. 28, 1883, col. A, at 3. This article further stated that “[t]he sight of the burly wife-beater and his disfigured little wife was enough to make manhood indignant, whether he be an arm of the law or not.” *Id.*

94. *Gerholdt Playing the Model Husband*, DAILY EVENING BULL. (S.F., Cal.), Oct. 16, 1860, at col. D (noting the neighbors reported Gerholdt’s “savage assault made upon his own wife” to the police, but that Gerholdt fled).

95. *The Warrenheip Outrage*, ARGUS (Melbourne, Austl.), Feb. 27, 1860, at 5

inhuman assault upon a wife” by a “cruel husband and a debased drunkard.”<sup>96</sup> Although newspapers occasionally criticized courts for imposing insufficiently severe penalties,<sup>97</sup> judges usually exercised their authority in ways that revealed their contempt for wife beaters.<sup>98</sup> One Los Angeles judge opined, for example, that “wife-beating is one of the most contemptible of crimes,”<sup>99</sup> and another declared that “wife-beating has no place in our civilization . . . and severe punishment should be meted out in such cases.”<sup>100</sup>

As we shall see, however, there was no simple solution to the social problem of intimate-partner violence during the period covered by this Article. Effective deterrent measures proved elusive, as they do today. Dismissals and noncustodial sentences for misdemeanor domestic assaults constitute a point of continuity, not contrast, between the prevalent outcomes of such cases historically and those in the twenty-first-century United States.<sup>101</sup> Then, as now, abused women sometimes impeded criminal prosecutions by recanting or refusing to testify. Many of them had no place to seek long-term shelter and no means of financial support, which left them vulnerable both to retaliatory violence and to the prospect that courts would

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(recounting the “sickening story” of how a woman’s “fiend-like husband,” James Williams, had committed a “brutal outrage” upon her, inflicting head injuries and other wounds); *see also The Eastern Border: Another Case of Brutal Wife Beating Reported*, MORNING OREGONIAN (Portland), Mar. 24, 1891, col. A, at 12 (reporting that an Oregon man’s beating and abuse of his wife “in a most brutal manner” caused “widespread indignation among all the neighbors”).

96. *The Courts: Police Court*, DAILY EVENING BULL. (S.F., Cal.), Apr. 29, 1874, at col. C; *see also The Courts: Police Court*, DAILY EVENING BULL. (S.F., Cal.), June 10, 1874, at col. C (reporting, on a different case, that a “sordid wretch convicted of making an outrageous assault upon his wife” was committed to county jail for defaulting on his fine).

97. *See Frank Toal: The Brutal Wife-Carver and His Light Sentence*, L.A. TIMES, Aug. 22, 1885, at 4 (“It is safe to say that nearly everyone in the court-room was surprised by the lightness of the sentence. From the almost unparalleled atrocity of Toal’s crime, and from the pertinent remarks thereon made by the judge himself, it was expected that the term would be at least ten years,” rather than the five years the defendant actually received for pleading guilty to assault with intent to murder.); *see also* Untitled, THE AGE (Melbourne, Austl.), Nov. 27, 1874, at 2 (“Assaults upon women, by adult males, are becoming far too common in our midst, and are visited in too many instances by punishments ridiculously inadequate to the gravity of the offence.”); Untitled, ARGUS (Melbourne, Austl.), May 9, 1868, at 5 (criticizing a police magistrate for imposing “a disgracefully inadequate penalty” on Joseph Fletcher for “assaulting his wife and turning her out of her house while in labour”).

98. *See People v. Griffith*, 80 P. 68, 73 (Cal. 1905) (describing a man’s shooting of his wife, leading to her partial blindness, as “brutal and unpardonable”); *see also Postmaster to be Lashed*, L.A. TIMES, Sept. 16, 1905, at I3 (reporting that an Oregon judge’s comments “preceding the sentence [of a wife beater] was a dramatic excoriation of the man”); *infra* notes 158–59, 161, 192, 223–24 and accompanying text (discussing judicial disapproval of wife beating).

99. *Wife Beater Sentenced*, L.A. TIMES, Mar. 23, 1914, at II7.

100. *Court Orders Peace Bond on Plea of Wife*, L.A. TIMES, Feb. 20, 1929, at A18. The judge in this case went on to express frustration that he could only require a peace bond from the batterer, as no criminal charges had been filed. *Id.*

101. *See* SCHNEIDER ET AL., *supra* note 8, at 342 (citing RICHARD R. PETERSON, COMBATING DOMESTIC VIOLENCE IN NEW YORK CITY: A STUDY OF DOMESTIC VIOLENCE CASES IN CRIMINAL COURTS (2003)); SUK, *supra* note 8, at 35–38.

imprison their breadwinning husbands. Indeed, in the late nineteenth and early twentieth centuries, the emerging view that wife beating was wrongful and ought to be punished existed in tension with many female victims' rejection of criminal law solutions.<sup>102</sup>

# 1. Punishing Domestic Assault and Battery

## a. Peace Bonds and Imprisonment in Australia

Although victim-initiated summons, obtained for a fee, were the most common means of haling abusive husbands into Australian courts,<sup>103</sup> police officers initiated the arrest of violent men for attacking their wives in the late 1800s in two scenarios. First, an officer might act on a tip from neighbors or others. For instance, "William Davis was charged with a most brutal assault on his wife" after "the police on being informed of the case went to the house."<sup>104</sup> Davis, a drunk who had previously been ordered to post a bond to keep the peace, due to his repeated assaults on his wife, pleaded guilty to malicious wounding and was sentenced to three years in prison with hard labor.<sup>105</sup> Second, and more rarely, a police officer might make his own independent investigation of an emergency that he discovered. The case of George Finlay, charged with being drunk and assaulting his wife in Victoria in 1860, provides an example of this latter category. George was arrested when the constable on duty came into his house to investigate a woman's screams. The constable found Catherine Finlay covered with blood from being stabbed with a three-cornered file and intervened as George began choking her. He arrested George despite Catherine's protestations and rescued him from "the anger of the crowd collected outside the house."<sup>106</sup> In court, Catherine "prayed for [George's] discharge," and he was released after being bound by his own recognizance of £25 to keep the peace for six months.<sup>107</sup>

Although the angry crowd and the constable's independent investigation of the Finlay assault may have been atypical for Australia, other features of these cases represented the norm. For example, one of the arrests resulted in the defendant being released after he provided his own recognizance for a specified amount of money.<sup>108</sup> Such an outcome resonates with those in my larger sample of eighty-four spouses charged with some type of nonfatal assault or wounding in Victoria in the 1860s. I primarily culled information about the eighty-four criminal defendants, some of whom repeatedly appeared in court for domestic violence, from the police

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102. See *infra* notes 160–65, 180–92 and accompanying text.

103. See ALLEN, *SEX AND SECRETS*, *supra* note 15, at 114.

104. Untitled, ARGUS (Melbourne, Austl.), Nov. 15, 1864, at 5. In another assault case, a doctor attending the pregnant victim got her violent husband placed in police custody. See *Heartless Conduct*, ARGUS (Melbourne, Austl.), May 9, 1868, at 5 (reporting the facts of the Fletcher assault case).

105. *Stabbing and Wounding*, ARGUS (Melbourne, Austl.), Dec. 2, 1864, at Supp. 1.

106. *Disorderly Conduct*, ARGUS (Melbourne, Austl.), Mar. 9, 1860, at 7.

107. *Wife-beating*, ARGUS (Melbourne, Austl.), Mar. 13, 1860, at 5.

108. See *supra* note 107 and accompanying text (describing the outcome of the *Finlay* case).

and county court columns of Melbourne's *Argus* newspaper. Journalists attended and reported on the routine business of such courts. These do not appear to be selective or sensationalistic accounts. Thirty-four of the eighty-four defendants escaped both a fine and jail time and were instead bound over to keep the peace for several months to one year. Either the defendant or those who posted sureties for him lost their money in the event of recidivism. If the defendant was convicted of a serious assault or was a repeat offender, the judge might sentence him to jail or prison for a term ranging from a week to several years.<sup>109</sup> He also might be jailed if he could not post the requisite bond or if he defaulted on a fine.<sup>110</sup> However, only twenty-two of the eighty-four Australian defendants in my sample received custodial sentences for intimate-partner violence during the period that I studied. Eight of them were ordered to pay a fine to the court or separate maintenance to their wives in lieu of incarceration. Eight cases were dismissed without any requirement of sureties or the defendant's recognizance, and one defendant was acquitted. The outcomes of eleven cases were unclear from my sources.

It is worth noting, however, that an Australian magistrate could not impose a prison term or a fine on the defendant in a common assault case if the victim declined to proceed; in such circumstances, justices could only require the accused to post a peace bond.<sup>111</sup> Leniency toward wife beaters was thus shaped by victim

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109. *See Assaulting a Wife*, ARGUS (Melbourne, Austl.), Oct. 16, 1862, at 6 (describing how habitual wife beater Robert Jenkins received a sentence of ten months in prison for striking his wife in the head with an axe); *The Warrenheip Outrage*, *supra* note 95 (stating that James Williams, the perpetrator of "brutal and savage" assault on his spouse, was sentenced to two years in prison with hard labor); *Williamstown*, ARGUS (Melbourne, Austl.), Apr. 30, 1866, at 6 (reporting that George Anderson, who was sentenced to fourteen days in jail for kicking his wife in the stomach, had previously endangered his wife's life, even though they were still newlyweds); *Untitled*, ARGUS (Melbourne, Austl.), July 2, 1868, at 5 (stating that the bench required a man named Wilson, "who nearly killed his wife . . . by brutal ill-usage," to serve a six-month prison sentence, in addition to posting a surety); *Untitled*, ARGUS (Melbourne, Austl.), Nov. 23, 1860, at 5 (reporting that John Henderson, who had been before the court "some 30 times," was sentenced to two months in jail for violently assaulting his wife).

110. *Brighton*, ARGUS (Melbourne, Austl.), Sept. 8, 1866, at 6 (reporting that Joseph Mercer was imprisoned because he could not provide sureties or post bail); *see also, e.g.*, *Untitled*, ARGUS (Melbourne, Austl.), Dec. 6, 1864, at 5 (similar report about defendant John Sunderland).

111. *See* PLUNKETT & WILKINSON (1860), *supra* note 69, at 24 ("[T]he Justices have no jurisdiction to convict in a penalty against the will of a complainant, where he prays only that the defendant may be bound over to keep the peace." (citing *R. v. Deny*, L.J.M.C. 189)); *see also* WILKINSON ET AL. (1903), *supra* note 78, at 36 (same). In an 1868 case in which John Broadhurst appeared as a defendant, for example: "His wife complained that when he got drink he shamefully illused her, and she was not safe with him. Yet she did not wish to press the charge against him if he would promise to behave better in future; but the magistrates very properly made the order for surety." *Wife-Beating*, ARGUS (Melbourne, Austl.), Dec. 15, 1868, at Supp. 1. Justices had more discretion in cases of *aggravated* assault on women and children because those cases could be initiated "either upon the complaint of the party aggrieved or otherwise." PLUNKETT & WILKINSON (1860), *supra* note 69, at 24.

preferences. Indeed, despite its failure to deter intimate-partner violence,<sup>112</sup> the peace-bond approach revealed judicial awareness of the ongoing danger that abused women faced. Australian judges could only require sureties for threatening words or conduct that raised “a fear of some present or future danger, and not merely for a battery or trespass that is past.”<sup>113</sup> Since so many peace bonds were required from batterers, courts must have acknowledged the recurrent nature of domestic abuse. Moreover, judicial commitment to imposing some kind of financial constraint on the defendant’s behavior despite the victim’s desire to drop the case shows an emerging view of domestic violence as a public problem, rather than an exclusively private matter.

#### b. Fines and Jail Terms for Wife Beaters in the American West

California courts took a more vigorous approach. Fines predominated over peace bonds and, in the 1870s, the penal code even gave judges discretion to punish a battery “committed upon the wife of the assailant” with “not less than twenty-one lashes on the bare back.”<sup>114</sup> Although whipping was rarely, if ever imposed, wife beaters in California during the late 1800s and early 1900s had to pay substantial sums of money to avoid jail time, and some were incarcerated without being offered a fine as an alternative.<sup>115</sup> Similar outcomes occurred in other western

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112. See *infra* Part II.B.4.

113. PLUNKETT & WILKINSON (1860), *supra* note 69, at 396 (emphasis in original); see also WILKINSON ET AL. (1903), *supra* note 78, at 1109–10; WILKINSON ET AL. (1894), *supra* note 79, at 841–44. For further discussion of the failure of peace bonds to deter recidivism, see *infra* Part II.B.4.

114. An Act to Amend Section Two Hundred and Forty-Three of the Penal Code, ch. ccxc, § 1, 1876 Codes of California 110 (effective Apr. 21, 1876). This rarely imposed provision allowing corporal punishment for wife beating was removed in 1881. See *infra* note 118 (discussing changes in the potential penalties for battery). Some other American states enacted misdemeanor wife-beating statutes. See *State v. Harrigan*, 55 A. 5, 5 (1902) (citing 22 Del. Laws 493 (1901)).

115. For defendants given a choice between a monetary penalty or a jail term, see *A Sailor Canes His Wife*, *supra* note 86, col. F, at 3 (noting that, in December 1882, a wife beater was fined \$100, in default of which he would be jailed for fifty days); *A Wife-Beater Sentenced*, DAILY EVENING BULL. (S.F., Cal.), June 8, 1863, at col. B (stating that Matthew McQuinn must pay \$100 or be imprisoned for fifty days for “throwing his wife and child around the room” while intoxicated); *Tries to Slay with an Ax*, L.A. TIMES, Mar. 2, 1907, at II11 (reporting that a drunken man was sentenced to a \$60 fine or sixty days in jail for assaulting his wife with an axe); *Wife Beater Sentenced*, L.A. TIMES, Aug. 14, 1929, at 11 (stating that a wife beater was sentenced to a \$100 fine or one hundred days in jail); *Woman Beaters Heavily Sentenced*, DAILY EVENING BULL. (S.F., Cal.), Nov. 9, 1871, at col. D (reporting that Harris Altman received a fine of \$150 or seventy-five days in jail for “an outrageous assault on his wife”). For defendants sent to jail without being offered a monetary penalty instead, see *A Wife Beater Punished*, DAILY EVENING BULL. (S.F., Cal.), Aug. 10, 1871, at col. E (noting that a wife beater was sent to jail for four months for an assault on his wife); *Doings of the Police Court*, DAILY EVENING BULL. (S.F., Cal.), Nov. 13, 1861, at col. D (reporting a thirty-day jail sentence for assault and battery upon a wife); *Wife Beater Jailed*, *supra* note 86, at G10 (recording a six-month jail sentence for a wife beater); *Wife Beater Sentenced*, L.A. TIMES, May 18, 1900, at II5 (stating that a guilty plea resulted

states.<sup>116</sup> The American response was thus more severe than Australia's, in the sense that domestic violence defendants could expect to incur nonrefundable monetary penalties or to spend days or even months behind bars. Yet, unlike Australian magistrates, courts in California and other western states tended to discharge defendants without even requiring sureties if their wives wanted to drop the charges.<sup>117</sup>

Fines for wife-beating ranged from \$5 to \$1000 throughout the entire period (1860–1930), with the most common amounts being \$50 to \$200. These sentences fell within the statutory range applicable to any assault or battery; they did not constitute a special approach taken in wife-beating cases.<sup>118</sup> Interestingly, the monetary penalty for assaulting one's wife did not increase over the seventy-year period covered by this Article, despite changes in the value of money. When Elbridge Hopkins was fined \$100 for throwing vitriol on his wife in 1862, that sum would have been worth about \$2200 in today's money.<sup>119</sup> R.E. Carroll's \$100 fine for wife-beating in 1929 corresponds to only about \$1200 today but was associated with a lesser conviction than Hopkins's (simple assault, as opposed to assault and battery).<sup>120</sup> In any event, these monetary penalties were not trivial.

Many Californians who inflicted physical injury on their wives were imprisoned for several months. A statutory amendment in 1881 permitted offenders convicted of battery to be sentenced to *both* a fine and incarceration, and in 1911, the legislature increased the potential jail term for simple assault to six months, which could be combined with a monetary penalty.<sup>121</sup> Indeed, although some scholars assert that the Progressives decriminalized domestic violence, Los Angeles courts

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in a ninety-day jail term for a man who beat his wife with a club).

116. See *Oregon News Items*, DAILY EVENING BULL. (S.F., Cal.), July 20, 1881, col. F, at 4 (noting that a man in Oregon was “fined \$50, and in default was sent to the County Jail” for assault and battery on his wife); Untitled, ROCKY MOUNTAIN NEWS (Denver, Colo.), Apr. 6, 1882, at col. C (stating that a Colorado defendant received a forty-day jail sentence for beating and choking his wife).

117. See *infra* notes 186–88 and accompanying text (discussing the dismissal or down-charging of cases due to the victim's refusal to prosecute).

118. Starting in the 1850s, simple assault was punishable by a fine not exceeding \$500 or by imprisonment not exceeding three months. 1855 Cal. Stat. § 243, at 220. According to a statutory amendment in 1911, the court could impose both a fine and incarceration, and the possible jail term was increased to six months. 1911 Cal. Stat. § 241, at 687. From 1850, a conviction for battery, which encompassed “the unlawful beating of another,” resulted in a fine not exceeding \$1000 or imprisonment in county jail for up to one year. 1850 Cal. Stat. § 51, at 234. In 1881, the potential penalty for battery was amended to allow both incarceration and a fine, and the provision permitting the corporal punishment of wife beaters was removed. 1881 Cal. Stat. § 243, at 10 (Desty 1881).

119. *Vitriol Throwing*, DAILY EVENING BULL. (S.F., Cal.), Oct. 27, 1862, at col. C. The value of the fine in 2010 was calculated using the Consumer Price Index, which measures the change in the cost of a bundle of goods and services purchased by the average urban consumer. Calculator available at <http://www.measuringworth.com/uscompare>.

120. *Wife Beater Sentenced*, *supra* note 115. The value of the fine in 2010 was calculated using the Consumer Price Index, which measures the change in the cost of a bundle of goods and services purchased by the average urban consumer. Calculator available at <http://www.measuringworth.com/uscompare>.

121. See *supra* note 118 (describing the penalties for battery and simple assault).



continued to impose jail time on wife beaters throughout the 1920s.<sup>122</sup> Assaults on female intimates resulted in prison sentences of up to two years when deadly weapons were involved.<sup>123</sup>

Although some cases originated with the abused wife's complaint, neighbors and bystanders in the American West seem to have taken a more active role in reporting domestic violence throughout the period covered by this Article than they did in either the urban American Northeast or Australia.<sup>124</sup> In a California case in 1860, a man beat his screaming spouse "until the neighbors came to her rescue" and called the police; "[t]he woman was [then] given shelter in another house" for fear she would pay with her life "for the sin of letting her neighbors know . . . how family matters went on."<sup>125</sup> Relatives also initiated charges against batterers.<sup>126</sup> Beyond calling the police, neighbors and family members might intervene physically in domestic violence. For example, a California woman threatened a

122. Some wife beaters in the 1920s received six-month jail terms. *See Beater of Wife Gets Full Term*, L.A. TIMES, Feb. 3, 1927, at A13; *Gets Six Months on Wife-Beating Charge*, L.A. TIMES, May 23, 1924, at A5; *Wife-Beater Jailed*, L.A. TIMES, Sept. 16, 1923, at I15; *Wife-Beater Sent to Cell*, L.A. TIMES, July 15, 1924, at 10. Others spent less time behind bars but still received custodial sentences. *See Husband Gets 120 Days as Wife Beater*, L.A. TIMES, June 21, 1927, at A7 (recording a 120-day sentence for wife beating and nearly as a severe a penalty for Prohibition violations); *Husband Sent to Jail*, L.A. TIMES, Mar. 19, 1928, at A9 (noting a sixty-day sentence for wife beating); *Placed in Jail for Wife-Beating Task*, L.A. TIMES, Mar. 1, 1923, at I10 (stating that a wife beater received a ninety-day jail sentence); *Wife Beater Goes to Jail*, L.A. TIMES, Aug. 29, 1928, at A3 (reporting a sixty-day jail term for wife beater). Indeed, the likelihood that a wife beater would be incarcerated at least briefly seems to have been high in the 1920s. *See Man Beats His Wife to Get Jail Meal*, L.A. TIMES, Feb. 25, 1928, at 6 ("[H]e knew if he would beat his wife, he would be arrested, jailed, and fed."). *But see supra* note 12 (citing legal histories that associate the Progressive Era with the decriminalization of domestic violence).

123. *See Griffith Sentenced to "Pen" and Fined*, L.A. TIMES, Mar. 11, 1904, at A2 (reporting that defendant received the maximum sentence of two years for assaulting his wife with a loaded revolver); *see also* *People v. Griffith*, 80 P. 68 (Cal. 1905) (affirming the conviction). The authorized penalty for assault with a deadly weapon in California from 1850 to 1921 was a two-year prison term, a fine not exceeding \$5000, or both. *See* 1850 Cal. Stat. 234. In 1921, the legislature increased the potential prison term to ten years. 1921 Cal. Stat. 86.

124. For a discussion of neighborly reluctance to intervene in intimate-partner violence in nineteenth-century Australia, *see infra* note 217 and accompanying text. The decreased ability of abused women in New York to rely on neighborly assistance is discussed in Ramsey, *Intimate Homicide*, *supra* note 30, at 165–68. Pamela Haag also notes that "[w]orking-class women's willingness to risk personal injury in protecting one another from domestic violence" diminished in New York City in the late 1870s. Pamela Haag, "The Ill-Use of a Wife": *Patterns of Working-Class Violence in Domestic and Public New York City, 1860–1880*, 25 J. SOC. HIST. 447, 469 (1992). Similarly, Linda Gordon's study of wife beating in Boston documents greater support and assistance from abused women's relatives than from their neighbors. GORDON, *supra* note 12, at 278–79.

125. *Gerholdt Playing the Model Husband*, *supra* note 94.

126. *See, e.g., Wife-Beating Charge Filed*, L.A. TIMES, Jan. 2, 1926, at A6 (reporting that the defendant's mother-in-law alerted the police to his beating and false imprisonment of his wife).

man with a shotgun when he came into her house to assault his wife, who was hiding there.<sup>127</sup> Wife beaters were sometimes taken into custody by private citizens,<sup>128</sup> and mobs occasionally imposed extralegal punishments, such as tarring and feathering the offending husband or forcing him to ride a rail.<sup>129</sup> Some of these incidents morphed into fights between men,<sup>130</sup> as did arrests by police officers that wife beaters resisted.<sup>131</sup>

The police continued to respond to reports of wife beating from neighbors and family members in the early twentieth century.<sup>132</sup> State intervention was not limited

127. *Saved Wife a Beating*, L.A. TIMES, Nov. 18, 1904, at A10; cf. *Shot Down by His Son*, L.A. TIMES, Sept. 5, 1904, at 4 (reporting that neighbors shielded an eleven-year-old boy, who shot his abusive father to defend his mother, and that they “made no secret of the fact that they approved of his act”); *Wife Beater and His Victim*, L.A. TIMES, June 2, 1904, at A2 (stating that a wife beater’s teenaged son hit him with a shovel to stop the battering of his mother).

128. In 1868, a group of railroad workers responded to a Sacramento woman’s cries by entering her abode, taking her husband to the stationhouse, and calling for a physician. See *Murderous Assault by a Husband*, DAILY EVENING BULL. (S.F., Cal.), May 28, 1868, at col. H; see also *Savage Assault*, DAILY EVENING BULL. (S.F., Cal.), Oct. 18, 1870, at col. C (reporting that, when Roger Dockery beat and kicked his wife on a public street, “a gentleman arrested him and took him away”).

129. *Ridden on a Rail*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Jan. 9, 1890, at col. E; see also *Albina’s Contribution: A Wife Beater That Had Better Look a Little Out*, MORNING OREGONIAN (Portland), Oct. 21, 1889, col. C, at 8 (reporting that neighbors threatened a wife beater with tarring and feathering); *Tar and Feathers*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Oct. 21, 1889, col. D, at 6 (same).

130. A San Francisco newspaper published a report about a man charged with wife beating and assault on a neighbor:

The testimony showed that [Thomas] Mullen, within his own castle, was enjoying himself by threshing his wife; and that [Peter] Robinson, among others, heard what was going on, went to the house and told Mullen he ought to be ashamed of himself. . . . Mullen was aroused, and in no mood to tolerate such invidious remarks; so he came to the door and transferred his attentions to Robinson. Robinson, who said that he had often given work to Mullen, simply out of pity to his wife and family, gave back better blows than he received.

*Local Matters: Wife-Whipping and Choking*, DAILY EVENING BULL. (S.F., Cal.), June 5, 1860, at col. B; see also *A Thumper Thumped: A Cowardly Wife Beater Who Got Beautifully Whipped*, ROCKY MOUNTAIN NEWS (Denver, Colo.), July 21, 1888, col. D, at 2 (reporting that a bystander severely beat “a cowardly wife beater” in Denver, Colorado); *Wife-Beater Drury’s Case*, L.A. TIMES, Jan. 1, 1900, at II5 (describing how a Santa Ana, California man got into a violent fight with a neighbor when he intervened in a bout of wife beating).

131. See *Bob Hatfield Shot Dead*, L.A. TIMES, Dec. 30, 1901, at 3 (reporting that a sheriff’s deputy killed a man in a mining camp near Globe, Arizona, while attempting to arrest him for wife beating); *Man Killed by a Policeman in Sacramento*, DAILY EVENING BULL. (S.F., Cal.), Dec. 19, 1861, at col. C (stating that a police officer fatally shot a wife beater who attacked him with an axe while resisting arrest); *Sent to Hades: A Lake City Wife-Beater Shot by the Officers*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Sept. 20, 1883, at col. C (noting that deputy city marshals killed a Colorado wife beater after he fired at them).

132. See *For Wife Beating*, *supra* note 86; *Wife-Beating*, L.A. TIMES, July 10, 1904, at B11; *Wife-Beating Charge Filed*, *supra* note 126, at A6.

to violence against dutiful wives who remained at home with their husbands. Rather, courts also fined men for trying to exercise authority over estranged spouses.<sup>133</sup> At the onset of the twentieth century, for example, a jealous male defendant whose spouse had obtained a divorce but then continued to live with him, as well as to date other men, received this stern rebuke from a Los Angeles judge: "Whatever the provocation of your wife, you had no right to assault her. If you couldn't stand her manner of living, this is a large country, and you could have gone to other parts . . . ."<sup>134</sup>

Women rarely appeared as defendants on domestic assault charges, but when they did, the outcomes of their cases in Australia differed from those in the American West. Australian courts typically ordered female defendants to post peace bonds or imposed other penalties comparable to those for men,<sup>135</sup> whereas magistrates in the American West refused to take husband beating seriously. A San Francisco police court dismissed a complaint against the wife of a sailor, for example, telling the beaten man that "his remedy lay in divorce."<sup>136</sup> The few American women tried for assault with a deadly weapon were typically acquitted, and judges censured the men involved for failing to live up to ideals of economic productivity and temperance.<sup>137</sup> Even Australian courts, which viewed violent wives as serious transgressors, made efforts to ascertain whether the husband had

133. *Police Court Record*, DAILY EVENING BULL. (S.F., Cal.), May 24, 1871, at col. E.

134. *Father and Son in County Jail*, L.A. TIMES, Dec. 28, 1901, at 10.

135. See *Assault*, ARGUS (Melbourne, Austl.), Nov. 25, 1864, at 6 (reporting that Johanna Holland, charged with assaulting her husband, was ordered to provide a surety for £20 to keep the peace towards him for three months); *Untitled*, ARGUS (Melbourne, Austl.), Aug. 11, 1868, at 6 ("Mary Williamson, brought up on warrant at the instance of her husband, James Williamson, was shown to be a drunken virago, who had broken the unfortunate man's head with a bottle."); *Untitled*, ARGUS (Melbourne, Austl.), Jan. 16, 1862, at 5 ("Catherine Powell, charged with threatening her husband's head and limbs with an American axe, was ordered to find two sureties to keep the peace towards him.").

136. *Double, Double, Toil and Trouble*, DAILY EVENING BULL. (S.F., Cal.), Nov. 21, 1863, col. C, at 5 (noting the court's dismissive attitude toward a man named Double, who complained his wife had "pulled his ears and whiskers" and "was in the constant habit of beating him").

137. See *A Mean Deception*, DAILY EVENING BULL. (S.F., Cal.), July 27, 1874, at Issue 94, col. B (reporting that a husband-beating case had been dismissed for lack of evidence and that the intemperate husband injured himself with a handsaw); *Police Court*, DAILY EVENING BULL. (S.F., Cal.), Feb. 13, 1875, at col. A (stating that Helena Bose acted in self-defense against her husband, "a worthless vagabond who had been dependent upon his wife for support"); see also *A Badgered Woman Escapes Punishment*, DAILY EVENING BULL. (S.F., Cal.), Nov. 24, 1888, at col. F (noting that a jury promptly acquitted Mary Murphy of assault with a deadly weapon against her ex-husband); *Two Acquittals: Charges of a Serious Character Disproved in Court*, DAILY EVENING BULL. (S.F., Cal.), Apr. 1, 1887, col. C, at 2 (reporting that Johanna Henry was acquitted of having struck her husband with a hatchet). But see *San Diego County: Woman Sent to the Penitentiary*, L.A. TIMES, Apr. 30, 1901, at 15 (stating that Stella Lynch received a two-year prison sentence for assaulting her former husband with a deadly weapon).

actually inflicted the most serious abuse before declaring the guilt or innocence of a female defendant.<sup>138</sup>

## 2. Cases Involving Intent to Kill

After an arrest occurred, if there was evidence of homicidal purpose, the prosecutor typically charged the defendant with a more serious crime—attempted murder, shooting with intent to kill, wounding with intent to murder, assault with intent to kill, or the like. Conviction for such crimes in both the American West and Australia resulted in a substantial prison sentence, rather than simply a peace bond or a fine. Courts in Victoria imposed incarceration for one to twenty years, and California sentences were comparable. Indeed, it was not uncommon for male defendants to be sentenced near the top of the possible range for crimes involving intent to kill their wives.<sup>139</sup> New South Wales even mandated capital punishment for some forms of attempted murder until 1955.<sup>140</sup> However, death sentences in

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138. See *Assaulting a Husband*, ARGUS (Melbourne, Austl.), Mar. 19, 1864, at 6 (stating that Anne Wright's case would be remanded for a week to allow her to gather evidence that her husband "had ill-treated her in many ways"); *Untitled*, ARGUS (Melbourne, Austl.), Oct. 10, 1862, at 5 (reporting that the Fitzroy police magistrate determined that a female defendant threw a ladle at her husband only after considerable provocation from the recidivist wife beater).

139. In California, assault with intent to commit murder was punishable by a prison term of one to fourteen years throughout the period covered by this Article. 1850 Cal. Stat. 234. For examples of male defendants in California who received severe punishment for such crimes, see *A Plea of Insanity*, DAILY EVENING BULL. (S.F., Cal.), Apr. 6, 1882, at col. C (recording Francis DeClee's fourteen-year prison term for assault with intent to murder his wife); *State News in Brief*, DAILY EVENING BULL. (S.F., Cal.), July 22, 1879, at col. D (stating that John Ashcroft [a.k.a. Ashcraft] received a fourteen-year sentence for trying to kill his wife when she filed for divorce); cf. *San Berdoo Briefs*, L.A. TIMES, Nov. 4, 1905, at I18 (indicating that Fred Valenzuela's two-year prison term for assaulting his wife with intent to murder her was merciful due to his ill health); *San Bernardino Briefs*, L.A. TIMES, Mar. 25, 1906, at IV12 (noting a comparable example of mercy for a sick defendant).

Australian courts also imposed long sentences in cases in which the prosecution showed intent to kill. See, e.g., *Untitled*, ARGUS (Melbourne, Austl.), Oct. 12, 1868, at 5 (reporting that Edwin Chadwick was sentenced to twenty years' penal servitude for the attempted murder of his wife). Defendants could sometimes escape such harsh penalties by pleading guilty to lesser offenses. See, e.g., *Coversheet*, Queen v. Johnston, Case 5, Unit 319 (1866), Criminal Trial Briefs, VPRS 30/P/0, Public Record Office Victoria (PROV) (copy on file with author) (recording that, after initially being charged with stabbing his de facto wife with intent to murder her, defendant pleaded guilty to wounding with intent to do grievous bodily harm and was sentenced to twelve months in jail with hard labor); cf. *Coversheet*, Queen v. Turnbull, a.k.a. Vance, Unit 319 (1867), Criminal Trial Briefs, VPRS 30/P/0, PROV (copy on file with author) (noting that, although a female defendant was charged with wounding her husband with intent to murder him, she received a four-year sentence for the lesser offense of wounding with intent to do grievous harm).

140. *Strange*, *supra* note 45, at 43; see PLUNKETT & WILKINSON (1860), *supra* note 69, at 28 (citing 1 Vic., c. 5, s. 2); WILKINSON ET AL. (1903), *supra* note 78, at 184 (citing Crimes Act, No. 40, 1900, s. 27); WILKINSON ET AL. (1894), *supra* note 79, at 150 (citing 46 Vic., No. 17, s. 16).

intimate-partner cases tended to be commuted to imprisonment, and if the victim survived, the term actually imposed might be less than ten years.<sup>141</sup>

Light sentences for male defendants convicted of attempted murder provoked controversy. For example, the *Los Angeles Times* expressed disappointment that an infamous batterer named Frank Toal received only a five-year sentence for trying to kill his wife when she separated from him.<sup>142</sup> Similarly, while men of every class had reason to empathize with cuckolds, the *Sydney Morning Herald* criticized the executive for commuting a husband's death sentence for a near-fatal attack on an alleged adulteress in 1904.<sup>143</sup> Nevertheless these would-be murderers were convicted, not acquitted.

When considering a man's guilt, unwillingness to excuse or justify his attempt to kill a woman he was "in law and in honour bound to protect"<sup>144</sup> stemmed from a growing cultural sense that such behavior was unmanly. Disapproval of violence against wives was even more prevalent in the American West than in Australia. Hence, feeling against habitual batterer Frank Toal ran high,<sup>145</sup> and the *Los Angeles Times* ridiculed his feminine behavior behind bars: "Toal is confined in one of the women's cells. He boo-hoos, and says he loves his wife too much to part with her; and that he wouldn't have hurt her but for the whisky."<sup>146</sup> In the eyes of the legal authorities and the press, a man who misused the rights and duties of marriage by inflicting violence on his spouse lost his claim to be a true man.

Many male defendants charged with attempted murder sought to introduce evidence of provocation or the victim's bad character, but this strategy often failed

141. The case of Ralph Evans provides an example. In New South Wales in 1904, Evans faced the charge of shooting his allegedly adulterous wife with intent to murder her. A jury convicted him but recommended mercy based on his "previous good . . . character, kind treatment of wife & child, and great provocation by wife's disgraceful conduct." Coversheet, *Rex v. Evans*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7065 (1904, Central), State Record Office New South Wales (SRNSW) (copy on file with author). Evans's death sentence was commuted to penal servitude for five years with leave to petition for release at the end of three years. Executive Council Minute Books, 9/615 (1904), at 507, SRNSW (copy on file with author).

142. *Frank Toal: The Brutal Wife-Carver and His Light Sentence*, *supra* note 97, at 7. The newspaper expressed further outrage when Governor Waterman pardoned the prisoner after only one year in San Quentin. *Frank Toal: A Most Brutal Performance at His Residence*, L.A. TIMES, Apr. 21, 1889, at 6; see San Quentin Prison Register (Frank Toal, SQ #13665), California State Archives, Office of the Secretary of State, Sacramento, CA (recording Toal's pardon) (copy on file with author). For more on Toal's long career of terrorizing his wife, her reluctance to prosecute, and the public's animosity toward him, including threats of lynching, see *infra* notes 145–46, 181–85 and accompanying text.

143. Strange, *supra* note 45, at 323–25 (discussing *Rex v. Evans* and noting the *Sydney Morning Herald's* criticism of the commutation of Ralph Evans's death sentence to five years' penal servitude). In contrast, *Truth* defended the decision, vilifying the victim and casting the attempted murder as justifiable. See *id.* at 324.

144. See *id.* at 323 (quoting a December 1904 editorial in the *Sydney Morning Herald*).

145. *Is It Murder?: Frank Toal Caps the Climax of Long Brutality, by Hideously Carving His Wife*, L.A. TIMES, May 30, 1885, at 4. For threats to lynch Toal, see *infra* note 218.

146. *Mrs. Toal: Condition of the Unfortunate Woman Yesterday*, L.A. TIMES, May 31, 1885, at 3.

as a matter of law. For example, in a California case, Bill Arnold claimed he dragged his Indian wife from her horse and attacked her with a rock and a knife because he suspected that she planned to ride to town to consort with other men.<sup>147</sup> The California Supreme Court affirmed the trial judge's refusal to admit evidence of the suspected infidelity, however, on the ground that the defendant's jealousy was based on mere conjecture.<sup>148</sup> In any event, Arnold admitted that "he had been aware for some 18 months that she 'was running with every Tom, Dick, and Harry' . . . and yet had continued to live with her"—which showed he had not struck her in a sudden rage.<sup>149</sup> Although Arnold was convicted of assault with a deadly weapon, rather than the more serious charge of assault with intent to murder,<sup>150</sup> other male defendants in California were not so fortunate.<sup>151</sup> Nor was vilifying the victim guaranteed to lead to a merciful penalty for those convicted of attempted murder in Australia. When Edwin Chadwick cut his wife's throat on a lonely stretch of road in Victoria, for instance, he received a twenty-year sentence even though the victim's character "did not seem to be of the best."<sup>152</sup>

### 3. Victims' Reluctance to Prosecute

The relatively frequent use of noncustodial penalties for assault and battery in comparison to attempted murder and assaults involving deadly weapons and intent to kill might be construed as evidence of judicial reluctance to intervene in less serious intimate-partner violence. However, criticizing courts of the late 1800s and early 1900s for ignoring the plight of abused women risks underplaying the complexity of the social problem they faced and the extent to which they accommodated the wishes of victims who wanted the state's involvement to stop short of a jail term. Similarly, law enforcers' slow response time in some cases<sup>153</sup> may have been attributable to abused women's reluctance to prosecute and punish their batterers, rather than to societal apathy toward domestic violence. Australian police manuals counseled officers not to arrest men for "minor assaults on their

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147. *People v. Arnold*, 48 P. 803, 803 (Cal. 1897).

148. *Id.*

149. *Id.* at 804.

150. *Id.* at 803.

151. For example, in 1879, John Ashcroft (a.k.a. Ashcraft) received a fourteen-year term in state prison for attempting to murder his wife with a hatchet when she filed for divorce. *State News in Brief*, *supra* note 139 (reporting the defendant's sentence); see *Brutal Attempt at Murder*, DAILY EVENING BULL. (S.F., Cal.), May 21, 1879, at col. I (describing the facts of the case).

152. Untitled, ARGUS (Melbourne, Austl.), Oct. 12, 1868, at 5.

153. For example, in the late 1880s, a pregnant mother of ten named Kate Magee had been "bothering the life out of a Prosecuting Attorney's Assistant in order to obtain a warrant for the arrest of her husband" before the "huge, broad-shouldered fellow" was finally brought to a San Francisco court on battery charges and fined \$20. *Family Troubles: A Woman Procures the Arrest and Conviction of Her Husband*, DAILY EVENING BULL. (S.F., Cal.), May 29, 1889, at col. C. *But see Completes His Sentence*, L.A. TIMES, Dec. 31, 1907, at I13 (reporting that, in another case, the police "answered a hurry call . . . and arrived there in time to catch the [offender] dragging his wife around the house by the hair of her head and kicking her in the stomach").

wives, but the latter [was] advised to apply to a magistrate for a summons.”<sup>154</sup> A leading treatise further recommended a delay between the serving of the summons and the defendant’s court date “as these summary charges are frequently made by parties under sudden excitement.”<sup>155</sup> However, while officers occasionally avoided helping women perceived to defy traditional family ideals,<sup>156</sup> the unwillingness of victims to follow through in criminal cases seems to have been a more important factor in shaping police responses.

Like the press, many officers and judges disapproved of brutal husbands. A Los Angeles police captain declared, “[a] man who strikes a woman is no good at heart. If he does it when he is drunk, he is doubly a beast, and if he does it when sober, there is no punishment hard enough for him.”<sup>157</sup> In an Australian case involving a husband who beat, kicked, and trampled his estranged spouse after she left him and established a de facto marriage with another man, the trial court commented that “it was an unmanly act to treat a woman the way [the defendant] had done.”<sup>158</sup> The judge imposed a six-month jail term, despite the jury’s recommendation of mercy.<sup>159</sup> In that case, incarcerating the defendant harmonized with the wishes of the victim, who had instigated the prosecution and found another man to provide for her and her children.

More often, however, a punitive approach conflicted with the preferences of abused women, even though they initially sought the state’s protection.<sup>160</sup> When

154. ALLEN, *SEX AND SECRETS*, *supra* note 15, at 114 (quoting a 1905 police handbook from New South Wales).

155. WILKINSON ET AL. (1894), *supra* note 79, at 508. The same language also appeared in the 1903 edition. WILKINSON ET AL. (1903), *supra* note 78, at 665.

156. For instance, two lower-class women living apart from their husbands in Bathurst, New South Wales, in the 1910s unsuccessfully sought protection from death threats and stalking behavior by one of their spouses. At an inquest into the shooting of Jemima Jenkins by her husband, Jemima’s friend and housemate testified that she “sent a message to the police station for a constable to come. I sent the message by my son James Wilson. No constable came.” Deposition of Mary Wilson, Coroner’s Inquest at 26, *Rex v. Jenkins*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7204 (1915, Bathurst), SRNSW (copy on file with author).

157. *Give Lash to Such Brutes*, L.A. TIMES, Sept. 27, 1908, at I19.

158. *Aggravated Assault*, ARGUS (Melbourne, Austl.), Oct. 11, 1860, at 5.

159. *See id.*

160. *See Brief Mention*, DAILY EVENING BULL. (S.F., Cal.), July 7, 1883, at col. D (“The charge of assault to murder brought against Thomas Seawell . . . by his wife and sister-in-law has been dismissed by the Police Judge, the complainants declining to prosecute.”); *Wife-Beaters*, DAILY EVENING BULL. (S.F., Cal.), Aug. 7, 1860, at col. B (reporting that a California man “was arrested on the complaint of his wife for assault and battery,” but “[s]he did not care to prosecute to day”); *see also At the Trouble Bureau*, L.A. TIMES, Oct. 23, 1903, at A7 (stating that a wife-beating charge against Marino Cessares “was withdrawn on his wife’s motion”); *Brief Mention*, DAILY EVENING BULL. (S.F., Cal.), Mar. 1, 1883, at col. B (noting the dismissal of a case of assault with a deadly weapon due to the wife’s refusal to prosecute); *Police Court*, DAILY EVENING BULL. (S.F., Cal.), Dec. 22, 1874, at col. E (stating that a husband was fined only \$5 for assault and battery, “his wife refusing to prosecute”); *Untitled*, ARGUS (Melbourne, Austl.), Mar. 1, 1864, at 5 (recording that the Australian case against John Kelly, a man who threw a knife at his wife, was withdrawn because she did not want to press the charge); *Untitled*, ARGUS (Melbourne, Austl.), Sept. 29, 1862, at 5 (stating

repeat offender Robert Clelland pursued his wife with a drawn sword, for example, a Victoria police magistrate said:

[H]e felt it [was] his duty to protect defendant's unfortunate wife from his violence; this was not the first offence, and the only way to stop defendant's violence appeared to be to lock him up in gaol. . . . [But] the wife stated that sending him to gaol did him no good, if the Bench would only allow him to go to New Zealand it would be much better.<sup>161</sup>

In many cases, the victim's goal seems to have been to extract a promise from her husband in open court that he would "behave better in future"<sup>162</sup> and to teach him a lesson through pretrial detention.<sup>163</sup> She sought to use the criminal justice system to interrupt his coercive control over her, if only temporarily, without enduring the hardships to herself and her family that his conviction and imprisonment would inflict.

Judges were generally sympathetic to the abused wife's dilemma. When women explained why they opposed the criminal prosecution of their violent husbands, they often mentioned lingering affection for their mates or their belief that alcohol caused their mates' brutality.<sup>164</sup> Yet, courts could see behind these rote expressions of forgiveness to the other reasons the victim feared pressing her case, such as her fear that "if the husband went to jail their little ones would go hungry."<sup>165</sup> Indeed, for myriad legal, social, and cultural reasons, judges and juries in the late 1800s and early 1900s may have found a wife's inability to escape an abusive marriage more understandable than they did later in the twentieth century. The condemnation of

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that Mary Jenkins, the victim of an "assault of a very savage nature . . . is keeping out of the way, in order not to be made to appear against her husband"). In the rare cases involving assaults on husbands, men also tended to seek dismissal of charges against their wives. *See, e.g., A Forgiving Husband*, DAILY EVENING BULL. (S.F., Cal.), Oct. 12, 1889, at col. F ("The woman was locked up on a charge of assault with a deadly weapon, but the husband says he is willing to forgive her for her hasty action and will not prosecute.").

161. *A Wife-Beater*, ARGUS (Melbourne, Austl.), Sept. 12, 1862, at 6. Acceding to the abused woman's entreaties, "the Bench ordered defendant to enter into bail in the sum of £50 to keep the peace, especially towards his wife." *Id.*

162. *Wife-Beating*, ARGUS (Melbourne, Austl.), Dec. 15, 1868, at Supp. 1.

163. *See Girl Wife Refuses to Prosecute*, L.A. TIMES, May 12, 1925, at 6.

164. *See Assaulting a Wife*, ARGUS (Melbourne, Austl.), Sept. 19, 1864, at 6 (stating that the defendant "had promised to use her differently, and the witness was desirous of withdrawing her charge"); *Love Conquers*, L.A. TIMES, Apr. 17, 1907, at II2 ("He is a good man, and I was perhaps hasty in swearing to the charges. I don't want him to have to go to jail on my account."); *Wife-Beating*, *supra* note 162, at Supp. 1 (stating that the victim "asked that the Bench would not punish her husband, as he never thrashed her except when he was drunk"); *see also Going to a Higher Court*, DAILY EVENING BULL. (S.F., Cal.), Aug. 1, 1873, at col. E (reporting that the court dismissed an indictment against Thomas Devine for assault with a deadly weapon "at the earnest intercession of the woman, her husband being at the door of death from consumption").

165. *See Gave Him a Chance*, L.A. TIMES, Aug. 1, 1901, at 10. The battered woman in this case appears to have been candid about the financial stress that prompted her to seek mercy for her husband. At her entreaties, the judge imposed only a fifty-day suspended sentence, although he normally "[did] not look upon wife-beating with the least degree of allowance." *Id.*



domestic violence had not translated into a widespread commitment to support female autonomy in other ways. “The law of coverture rendered wives unequal, subordinate, and dependent throughout most of the nineteenth century.”<sup>166</sup> While the legal grounds for divorce had been expanded, women who sought to obtain one still faced significant social and procedural hurdles.<sup>167</sup> Moreover, battered wives “negotiated living with their husbands not as individuals but as mothers responsible for children.”<sup>168</sup> If they divorced their abusers, they had to find a way simultaneously to be caregivers and wage-earners in an economy that had little place for female workers. They also risked violent retaliation by their estranged husbands.<sup>169</sup>

The criminal law did not provide a simple panacea either. The imprisonment of parents placed children in great distress. In one Australian case, deemed to be a mutual assault, the judge incarcerated the couple for three months, due to their inability to post sureties, and also placed the children in jail, claiming imprisonment was the best way to protect them.<sup>170</sup> Yet, in the more typical scenario where the man received the blame, courts usually recognized that incarcerating a violent husband meant removing the main source of financial support from the family.<sup>171</sup> Some American politicians and police officers advocated whipping-post laws on the ground that the corporal punishment of abusive men would impose a lesser economic burden on their wives and children than incarceration. President Theodore Roosevelt declared in his State of the Union Address in 1904: “The wife-beater . . . is inadequately punished by imprisonment; for imprisonment may often mean nothing to him, while it may cause hunger and want to the wife and children who have been the victims of his brutality.”<sup>172</sup> Similarly, according to a Los Angeles police captain:

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166. Ramsey, *Provoking Change*, *supra* note 43, at 51 (citations omitted).

167. Post-bellum feminist and temperance leader Lucy Stone pointed out that most women could not afford to hire a divorce lawyer. *See* PLECK, *supra* note 8, at 104. Moreover, divorces obtained out-of-state were still uncertain “in their extra-territorial effects, for reasons that . . . have much to do with a general cultural sensibility that marriage was a good thing while divorce a bad one.” HARTOG, *supra* note 17, at 258. For these and other reasons, battered women’s decisions to remain in violent marriages were often “interpreted as evidence of their commitment to fulfilling wifely duties.” GORDON, *supra* note 12, at 257.

168. GORDON, *supra* note 12, at 261.

169. *See supra* notes 134, 158 and accompanying text and *infra* notes 182, 201, 242, 281 and accompanying text (discussing violent assaults on women following their attempts to divorce or separate from their husbands).

170. *See* Untitled, ARGUS (Melbourne, Austl.), Oct. 11, 1864, at 5 (discussing the *Geddes* case).

171. A trial judge in Victoria who sentenced a male defendant to two years’ imprisonment with hard labor “congratulated himself on being able to punish *one case* of wife-beating without injury to innocent persons, there being no children . . . to suffer for the errors of the husband.” *The Warrenheip Outrage*, *supra* note 95, at 5 (emphasis added).

172. Theodore Roosevelt, U.S. President, State of the Union Address to Congress (Dec. 6, 1904), in 10 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES & PAPERS OF THE PRESIDENTS, 1789–1907, at 813 (1908). Some scholars argue that the whipping-post laws arose from a desire to enforce the power of the white male establishment over Indians, blacks, and immigrants, rather than from any genuine concern to protect women from

Convict a man of wife beating and send him to jail for a long time and you take away the support of his family. He eats three square meals a day and sleeps well and his wife and children have to get out and work like dogs for food and shelter.<sup>173</sup>

Oregon passed a whipping-post law in 1905, and a sheriff there even announced that he planned to have abused women wield the lash themselves.<sup>174</sup>

In fact, however, courts rarely imposed whipping as a punishment for wife beating in the few western states that briefly provided for it.<sup>175</sup> By the early twentieth century, an alternative approach advocated in California involved sentencing the husband to hard labor, compensation for which would go to his wife and children as daily financial maintenance.<sup>176</sup>

A second concern constraining criminal sentencing was the potential escalation of violence against the victim; women who complained to the courts about being assaulted faced a very real threat of physical retaliation. Melbourne's *Argus* newspaper reported with disgust in 1862 that a man might be arrested for wife beating but, after providing a surety to the court, he would immediately "assault, kick, and nearly choke the unfortunate woman he had vowed to love and cherish."<sup>177</sup> Suspended sentences, which California courts sometimes imposed in the early twentieth century, had similar shortcomings, though the offender could be jailed immediately if he violated the conditions of the suspension.<sup>178</sup> Imprisonment might not have a deterrent effect on the batterer either. The *Los Angeles Times*

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domestic violence. See DAVID PETERSON DEL MAR, WHAT TROUBLE I HAVE SEEN: A HISTORY OF VIOLENCE AGAINST WIVES 87, 95 (1996) [hereinafter PETERSON DEL MAR, WHAT TROUBLE I HAVE SEEN]; PLECK, *supra* note 8, at 111; Siegel, *supra* note 8, at 2136–42. Considering evidence that wife beating met with widespread disapproval, however, such an allegation seems tenuous. For example, in early twentieth-century California, support for whipping-post laws coincided with indications that "[f]oreigners have formed the minority of offenders [in wife-beating cases], most of whom have been Americans." *Give Lash to Such Brutes*, *supra* note 157.

173. *Give Lash to Such Brutes*, *supra* note 157.

174. *Oregon's Whipping Post*, L.A. TIMES, June 19, 1905, at 16.

175. See PETERSON DEL MAR, WHAT TROUBLE I HAVE SEEN, *supra* note 172, at 77–78 (discussing Oregon's whipping-post law); *supra* note 114 and accompanying text (discussing California's earlier whipping-post law).

176. See *Would Lessen Wife's Burden*, L.A. TIMES, Mar. 25, 1914, at 117 (discussing a proposal by a Los Angeles Police Court judge); see also *Get Something Out of Nothing*, L.A. TIMES, Mar. 8, 1913, at 13 (indicating that abused women liked such an arrangement when it was adopted in San Francisco).

177. Untitled, ARGUS (Melbourne, Austl.), Oct. 3, 1862, at 5 (describing George Campbell's rapid return to wife beating following his appearance in police court on assault charges); see Untitled, AGE (Melbourne, Austl.), Nov. 27, 1874, at 2 (making a similar complaint about light penalties leading to recidivism in domestic assault cases).

178. See *Wife Beater Draws Ninety-Day Sentence*, L.A. TIMES, July 12, 1923, at 117 (reporting that Isadore Cohen was ordered to start serving his jail term at once when he beat his wife after being given a suspended sentence); see also *Wife-Beating Habit of Mexican Broken*, L.A. TIMES, Apr. 19, 1930, at 6 (stating that a Mexican defendant was back in court after he violated the terms of a ninety-day suspended sentence by continuing to batter his wife).

noted in 1908: "A jail sentence leaves him thirsty for revenge against the woman whom he blames for his stay behind bars."<sup>179</sup>

The understandable reluctance of victims to testify made the conviction of their abusers more difficult.<sup>180</sup> The *Los Angeles Times* reported on a California woman who repeatedly returned to her abusive mate in the 1880s despite repeated battering:

Mrs. Toal . . . refuses to leave her husband, and will never prosecute him. In fact, it is more than possible that when the present case comes up for trial, . . . she will say that she fell down on a bottle and cut herself, or make some other excuse.<sup>181</sup>

The *Times* expressed dismay that, although Mrs. Toal had filed for divorce and gotten a restraining order, she still "kept forgiving [her husband] and refusing to prosecute," despite being scalded, slashed, clubbed, and shot at.<sup>182</sup> Indeed, in 1887, she petitioned the governor to pardon Toal from his assault-to-murder conviction, claiming that he attacked her "upon great provocation" and that she was "greatly to blame for the quarrel which resulted in the assault."<sup>183</sup> Moreover, she thought "her children and herself would be much better provided for if her said husband were with his family."<sup>184</sup> Based on this pattern of behavior, the *Times* predicted that the Toals "will then go to living together again, and the old routine of fighting and drinking will continue until it winds up with the death of the wife at the hands of the husband."<sup>185</sup>

From the 1860s through the early twentieth century, charges against batterers were sometimes dropped or reduced because victims declined to give evidence.<sup>186</sup>

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179. *Give Lash to Such Brutes*, *supra* note 157, at II9.

180. Although spouses were generally prohibited from testifying against each other in a criminal action to which one or both were parties, there was an exception allowing such testimony "in cases of criminal violence upon one by the other." *People v. Rader*, 141 P. 958, 961 (Cal. Dist. Ct. App. 1914); *see People v. Johnson*, 98 P. 682, 682 (Cal. Dist. Ct. App. 1908).

181. *Frank Toal: A Most Brutal Performance at His Residence*, *supra* note 142, at 6.

182. *Mrs. Toal: Condition of the Unfortunate Woman Yesterday*, *supra* note 146, at 3; *see also Frank Toal: The Brutal Wife-Carver and His Light Sentence*, *supra* note 97, at 4 (reporting, in 1885, that Mrs. Toal had filed for divorce and obtained a restraining order against her husband).

183. Letter from Mary Ann Toal to R.W. Waterman, Governor of the State of California (Nov. 15, 1887) (copy on file with author); Application for Pardon # 4585 (Frank Toal), California State Archives, Office of the Secretary of State, Sacramento, CA (copy on file with author).

184. Letter from Mary Ann Toal to R.W. Waterman, *supra* note 183.

185. *Frank Toal: A Most Brutal Performance at His Residence*, *supra* note 142, at 6.

186. *See Carving-Knife Fray Patched*, L.A. TIMES, Sept. 29, 1927, at A5 (reporting that a judge discharged a defendant on a promise to "love, honor and obey" after his wife begged for him to be given another chance); *Love Conquers*, L.A. TIMES, Apr. 17, 1907, at II2 (noting that two complaints of wife beating and child abuse were dismissed when the complainant "experienced a change of heart" in Police Court); *Mrs. Sachs Disappears*, DAILY EVENING BULL. (S.F., Cal.), Sept. 7, 1882, at col. D (reporting that the prosecuting

For example, California prosecutors did not pursue a felony charge against E.H. Phelan due to his victim's refusal to testify. Phelan was instead prosecuted for simple battery, although the case was "one of the most brutal in the history of the [Los Angeles] police department."<sup>187</sup> Victim recantation might lead to acquittal if the case went to trial.<sup>188</sup>

Nevertheless, the state sometimes pressed domestic assault charges in the face of victims' noncooperation in both the American West and Australia. One Australian magistrate declared that "he would not allow the court to be used merely to threaten offending husbands."<sup>189</sup> Similar instances of judges imposing fines and even prison terms on male defendants, even though their female victims refused to assist the prosecution, occurred in the American West. When the wife of Theodore Costor appeared in a San Francisco court with a severely beaten face and said "she did not wish to prosecute him . . . the Court refused to allow a dismissal of the complaint."<sup>190</sup> Police officers took the stand to testify about the beatings they had witnessed,<sup>191</sup> and California judges even jailed a few recalcitrant victims for contempt to induce them to cooperate. For example, in 1922, Alysse LaClear spent a week behind bars for repeatedly refusing "to tell anything against her husband, who [was] charged with shooting her five times."<sup>192</sup>

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attorney was forced to drop an assault-to-murder case because the complainant "positively refused to prosecute her husband" and had left the state); *Police Intelligence: Cases Dismissed*, DAILY EVENING BULL. (S.F., Cal.), Jan. 22, 1876, at col. C ("Joseph Costa's wife relented, as usual, and a charge of assault and battery which she had preferred against him had to be dismissed in consequence of her refusal to prosecute.").

The following two cases exemplify the situation in Australia: *Assaulting a Wife*, ARGUS (Melbourne, Austl.), Sept. 19, 1864, at 6 (stating that, while the "[p]rosecutrix had sworn an information, in which she made out a very strong case against the prisoner," James Oldham, she subsequently desired to withdraw it and only testified reluctantly, which led to failure to prove the charge against the prisoner); and *Assault and Wounding, Etc.*, ARGUS (Melbourne, Austl.), Feb. 6, 1860, at Supp. 1 (noting that the most serious charges against John O'Brien were dropped because his wife "said she did not want to press the case").

187. *Brutal Husband Admits Guilt*, L.A. TIMES, June 30, 1907, at II6.

188. *See Husband Said to Have Shot Wife Is Free*, L.A. TIMES, May 14, 1924, at 3 (reporting that a jury acquitted Walter Peterson of assault with a deadly weapon after his wife recanted her prior testimony that he had been drinking and "endeavored in every way possible to free him of the charge that might mean a penitentiary term").

189. *Husbands and Wives*, ARGUS (Melbourne, Austl.), Dec. 19, 1862, at 7 (discussing the case of defendant Charles Kemp).

190. *A Brutal Husband*, DAILY EVENING BULL. (S.F., Cal.), Dec. 26, 1871, at col. G; *see Police Court*, DAILY EVENING BULL. (S.F., Cal.), Feb. 3, 1875, at col. C (reporting that a man was fined \$5 for wife beating after the victim refused to prosecute); *Police Court*, DAILY EVENING BULL. (S.F., Cal.), Dec. 22, 1874, at col. E (same); *San Bernardino and Orange: Jury Favors a Wife Beater*, L.A. TIMES, Apr. 28, 1904, at A6 (reporting that the defendant might have gotten a sentence more severe than six months in jail if his wife had not refused to cooperate in the prosecution); *see also Wounded Wife in Futile Plea for Probation*, L.A. TIMES, Apr. 25, 1924, at A3 (stating that a man received a two-year jail term and a \$300 fine for stabbing his wife, even though she begged for him to be placed on probation).

191. *See, e.g., Wife Whipper*, DAILY EVENING BULL. (S.F., Cal.), July 18, 1871, at col. C (reporting that a battered wife "did not desire to prosecute, but the officer testified to the beating, and the Court finally ordered him [the defendant] to pay a fine of \$50 or go to jail").

192. *Loyal Wife Could Not Block Case*, L.A. TIMES, May 2, 1922, at II10.

Judges' willingness to punish abusive men without the assistance of their victims provides evidence of strong social and legal disapproval of domestic violence. However, the discharge of the defendant was the most common outcome in cases of victim noncooperation. Although this Article demonstrates that the state intervened more strenuously in violent families in the late 1800s and early 1900s than other scholars have recognized, the aggressiveness of such intervention still pales by comparison to that under modern mandatory arrest laws and no-drop prosecution policies.

Support for a tougher stance in the late twentieth century arose from legitimate concerns that, unless police and prosecutors were required to pursue criminal charges, cases would continue to be dropped, batterers would control the process, and in the end, they would not be held accountable for their crimes.<sup>193</sup> Many feminists have subsequently criticized mandatory arrest and no-drop prosecution for denying women's autonomy.<sup>194</sup> These feminist claims that battered women should be treated as survivors, rather than as helpless victims, differ ideologically from the values of civilized manhood and protectiveness toward women articulated in the late 1800s and early 1900s. Yet, somewhat ironically, the new feminist critique of overly aggressive state intervention resonates with the dilemma that nineteenth-century police, prosecutors, and courts faced—how to prevent domestic violence without rendering battered women less safe than they would have been if the state had not intervened.

#### 4. Recidivism and Escalation to Homicide

Responding to intimate-partner assaults with peace bonds and fines was a dismal failure. In 1862, a police court in Victoria required sword-wielding Robert Clelland to post a bond of £50 to keep the peace against his wife.<sup>195</sup> Yet, over the next four years, he appeared before magistrates on domestic violence charges at least three times—each time providing a recognizance or sureties and promising to reform.<sup>196</sup> In one of many such incidents, the magistrate also issued a protection order on behalf of Eliza Clelland, but “the order . . . had been lost, and had lapsed.”<sup>197</sup>

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193. See, e.g., Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1888–89 (1996) (making similar arguments in favor of no-drop prosecution).

194. See SUK, *supra* note 8, at 14, 36–37 (describing the rise of mandatory arrest laws and no-drop prosecution policies); G. Kristian Miccio, *A House Divided: Battered Women, Mandatory Arrest, and the Conservatization of the Battered Women's Movement*, 42 Hous. L. REV. 237, 269–72 (2005) (noting feminists' uneasy relationship to the rise of mandatory state intervention). For feminist critiques of aggressive prosecution and arrest policies, see, for example, Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 714, 801–20 (2007); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 595 (1999).

195. See *A Wife Beater*, *supra* note 93, at 6 and text accompanying note 161 (discussing the victim's opposition to jailing her abuser).

196. See *Assault*, ARGUS (Melbourne, Austl.), Sept. 22, 1866, at 6; *Assaulting a Wife*, ARGUS (Melbourne, Austl.), June 8, 1866, at 6; *Assaulting a Wife*, ARGUS (Melbourne, Austl.), May 10, 1864, at 6.

197. *Assaulting a Wife*, ARGUS (Melbourne, Austl.), May 10, 1864, at 6.

I have not found any record of whether Robert eventually killed Eliza. However, court papers and news articles from both the American West and Australia tell the tragic story of other women whose husbands were fined, bound over to keep the peace, or briefly jailed, only to escalate their attacks to murder. During the 1880s, for example, police officers brought F.W. (a.k.a. William) Williams to the city prison in Los Angeles on several occasions “for being drunk and disorderly and for beating his wife.”<sup>198</sup> The abused woman complained “that he would kill her, as he had threatened her life a number of times.”<sup>199</sup> But despite her entreaties, Williams and a drunken companion were released after being ordered to pay a fine.<sup>200</sup> Nothing further was heard of the family until Williams murdered his spouse to prevent her from leaving the marriage.<sup>201</sup>

A similarly terrible escalation of violence occurred in the next century in New South Wales. In 1930, a jury convicted Sidney Solomon of murdering his pregnant wife, Roma, who had left him and returned to her parents.<sup>202</sup> Sidney had been convicted the previous year of assault and given a typical sentence: he was required to enter his own recognizance of £10 to keep the peace toward his wife for twelve months.<sup>203</sup> In default of entering the recognizance, he would be imprisoned with hard labor for seven days and required to pay costs; and in default of paying costs, he would be imprisoned with hard labor for two weeks.<sup>204</sup> Roma had taken him to court because she “couldn’t stand things as they were any longer,” but she promised to let him see the baby “as soon as it comes along.”<sup>205</sup> At the time of the

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198. *The Inquest*, L.A. TIMES, Aug. 15, 1887, at 1.

199. *Id.*

200. *Id.*

201. *Id.*; see also *Mrs. Williams: Why Her Husband Killed Her*, L.A. TIMES, Aug. 25, 1887, at 1 (reporting that the victim contemplated returning to a man to whom she had previously been married and that the defendant flew into a murderous rage when he learned of this plan). For more on the *Williams* verdict and sentence, see *infra* note 225 and accompanying text.

202. Clerk of the Peace, Register of Cases Heard Before the Central Criminal Court, 1923–1930, 19/13210, at 499 (Solomon, 1930), SRNSW (copy on file with author) (recording the conviction); Coversheet, *Rex v. Solomon*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7321 (1930, Central), SRNSW (copy on file with author) (same). For information on the couple’s separation and Roma’s pregnancy, see Deposition of Bernard Montgomery Garland, Coroner’s Inquest at 14, *Rex v. Solomon*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7321 (1930, Central), SRNSW (copy on file with author). See also Deposition of Grace Jean Peck, Coroner’s Inquest at 5, *Rex v. Solomon*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7321 (1930, Central), SRNSW (copy on file with author) (noting that the victim was pregnant with twins when she was killed). For a brief mention of this case, see Ramsey, *Provoking Change*, *supra* note 43, at 49–50.

203. Certificate of Conviction (dated Jan. 3, 1930), *Rex v. Solomon*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7321 (1930, Central), SRNSW (copy on file with author) (providing the details of Sidney Solomon’s conviction for assaulting his wife on Nov. 15, 1929).

204. *Id.*

205. Letter from Roma Mary Solomon to Sidney Solomon (Dec. 18, 1929), *Rex v. Solomon*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit

murder, the couple was living separately, and when Sidney appeared at his in-laws' house, his father-in-law ordered him off the property, reminding him of a peace bond that was still in force.<sup>206</sup> Sidney had brought a pistol though, and when Roma followed him into the street, he shot her to death.<sup>207</sup>

The deaths of Roma Solomon and Annie Williams may not surprise readers, for the failure of the state to prevent the escalation of intimate-partner violence is a narrative that has often been recounted. Yet my analysis brings several new insights to historical understanding of the problem. First, beginning in the mid-nineteenth century, if not earlier, police and courts responded to wife beating by arresting and punishing the perpetrators. However ineffective their efforts, they were not tantamount to a policy of refusing to interfere in the privacy of the home. As Hendrik Hartog has noted:

The law created marriage as a husband's private sphere. . . .  
And yet the law also described the boundaries of that private sphere:  
when it would be penetrated by public power and when any sense of  
private autonomy should melt away, as a husband was remade as a  
dishonorable and unworthy man.<sup>208</sup>

Second, when domestic assaults escalated to murder, male defendants received stern treatment. Both Sidney Solomon and F.W. Williams were sentenced to life in prison; indeed, Solomon only escaped the mandatory death penalty in New South Wales through executive commutation.<sup>209</sup>

### *C. Homicides Committed by Men*

Murder cases in both Australia and the American West show that men asserted their respectable status by policing and punishing other men for killing women. Part I.C will demonstrate the following: Wife killings constituted a significant portion of the criminal docket.<sup>210</sup> In both regions, the accused typically raised a defense of accident or insanity—either in lieu of, or in addition to, a provocation claim. Some insanity defenses in intimate-partner homicide cases resulted in

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Courts, 9/7321 (1930, Central), SRNSW (copy on file with author).

206. See Deposition of Bernard Montgomery Garland, Coroner's Inquest at 14, *Rex v. Solomon*, *supra* note 202 ("He was bound over to the keep the peace and I would not have him there any more. . . . I saw Solomon that day . . . I saw him sitting on my verandah. . . . I spoke to Solomon I said 'What are you doing here' . . . He said that he came there to see his wife and I said 'If your wife wishes to see you she will have to see you outside the fence.'").

207. See Deposition of Phyllis Maude Garland, Coroner's Inquest at 11, 13, *Rex v. Solomon*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7321 (1930, Central), SRNSW (copy on file with author).

208. HARTOG, *supra* note 17, at 136.

209. See *For Life: Williams, the Wife-Murderer Gets His Dose*, L.A. TIMES, Nov. 29, 1887, at 8 (reporting that Williams was sentenced to life imprisonment, but that the jury returned a verdict that spared him from the death penalty); *Solomon Case: Sentence Commuted*, SYDNEY MORNING HERALD (Austl.), May 28, 1930, at 13 (reporting the commutation of Solomon's death sentence to penal servitude for life).

210. For example, in New South Wales between 1890 and 1920, one-third of all murder trials involved femicide. Strange, *supra* note 45, at 314.

acquittals or a manslaughter “compromise,” but murder convictions and severe punishments seem to have been more common.<sup>211</sup> Male murder defendants who routinely beat, threatened, or otherwise ill-used their wives proved especially unsympathetic to courts, juries, and the press.

If the female victim had led a dissolute life, her death might be discounted. Yet women who simply left a bad marriage did not fit under this unsympathetic rubric, even if they had begun a partnership with another man. Courts interpreted the provocation category of witnessing adultery narrowly and literally, refusing to give manslaughter instructions in cases involving mere suspicion of infidelity or where the time lapse between the provocation and the killing had been too long. Thus, men actually had greater difficulty obtaining heat-of-passion mitigation in the late 1800s and early 1900s than they do today under the expansive modern doctrines of provocation and extreme mental or emotional disturbance.<sup>212</sup> In the past, courts and juries were more willing to see intimate-partner killings arising from sexual jealousy as purposive and premeditated, rather than spontaneous.<sup>213</sup>

Despite these similarities between Australian and American cases, relevant differences existed. First, Australian judges and juries displayed greater empathy than did their American counterparts for male defendants who killed out of rage at unfaithful or insubordinate wives. This was perhaps due to the residue of the “damned whore”/respectable woman dichotomy from the convict era or to fear of female encroachment on such male prerogatives as sexual promiscuity and binge drinking.<sup>214</sup> A second point, related to the first, is that popular condemnation of wife killers was more vociferous in the American West than in Australia. Australian crowds occasionally gathered to express outrage at wife beaters,<sup>215</sup> and a few neighbors risked their lives to shelter abused women.<sup>216</sup> But Australian

211. See, e.g., *infra* notes 283–85 and accompanying text (discussing acquittals), note 307 and accompanying text (noting manslaughter verdicts reached in cases where the defendant sought total exculpation on insanity grounds), and notes 225–49, 253–64 and accompanying text (analyzing first-degree murder convictions).

212. Ramsey, *Provoking Change*, *supra* note 43, at 42–51, 54–57.

213. *Id.*; see Ramsey, *Intimate Homicide*, *supra* note 30, at 144–52 (discussing narrow interpretations of the provocation doctrine); *id.* at 153–54 (describing New York murder defendant Frank Conroy’s unsuccessful insanity plea, based on evidence that his wife had gone riding with another man and that Conroy was “easily excited to anger”).

214. See *infra* notes 265–85 and accompanying text (analyzing acquittals and manslaughter mitigation in Australian cases) and note 295 and accompanying text (discussing the commutation of death sentences).

215. See *supra* notes 106–07 and accompanying text (describing the *Finlay* assault case).

216. A newspaper described this instance of neighborly intervention:

Mrs. Banks, to escape [her husband’s] violence, ran into the house of a neighbour, in her night-clothes, and the defendant followed in a furious passion, in order to continue the assault. The occupier of the house, Mr. W.T. Smith, interposed, with a view of restraining him; and in the scuffle found it necessary to inflict some personal chastisement upon him.

Untitled, ARGUS (Melbourne, Austl.), June 2, 1866, at 6.

Similarly, in a murder case prosecuted in Victoria in 1860, the victim sought refuge in a local pub after being beaten and stabbed by her husband. A man at the pub prevented the defendant from causing her further injury. See Memorandum of Sergeant Simmons, Queen



townsfolk more commonly expressed the view that, when a married couple fought, it was “just a little quarrel amongst themselves.”<sup>217</sup> By contrast, neighbors not only intervened in violent relationships in California and other parts of the American West, but angry crowds also threatened to lynch men deemed to have been excessively violent toward female intimates, and some prisoners were actually killed by lynch mobs.<sup>218</sup> Indeed, the punitive public response to wife killing in western American states may have sprung, in part, from the desire of legal elites to head off lynching and other private violence and to establish the state as the arbiter of criminal justice. Australia, by contrast, lacked a strong vigilante tradition.<sup>219</sup>

## 1. Murder Convictions

### a. Wife Murderers in the American West

I have previously demonstrated that in Denver County, Colorado, between 1880 and 1920, about sixty percent of a sample of forty-six men charged with murdering their female intimates were convicted of first- or second-degree murder. Less than ten percent obtained voluntary manslaughter mitigation, and less than twenty

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v. Meehan, Case 3-314-14, Unit 131 (1862), Criminal Trial Briefs, VPRS 30/P/0, PROV (copy on file with author). On another occasion, a different neighbor gave the woman shelter and stayed up all night with her to prevent the defendant from breaking into the house. *See id.*

217. Deposition of Thomas Boucher, Coroner’s Inquest, *Queen v. Hayes*, Case 3-291-18, Unit 127 (1860), Criminal Trial Briefs, VPRS 30/P/0, PROV (copy on file with author). *See also, e.g.*, Deposition of Emma Steddy, Coroner’s Inquest, *Queen v. Balmer*, Case 12, Unit 245 (1862), VPRS 30/P/0, PROV (copy on file with author) (saying of a married couple whose relationship was marred by drunkenness, beatings, and eventually homicidal violence: “I always kept away from them. I believe all the neighbors did.”); Deposition of Henry Howson, Coroner’s Inquest, *Queen v. Smith*, Case 3-339-31, Unit 136 (1860), Criminal Trial Briefs, VPRS 30/P/0, PROV (copy on file with author) (“I heard Smith say, ‘Get up you dirty bitch and put your clothes on.’ After that I heard more blows and passed on. I heard a faint groaning as the blows were being struck. As quarrels were so frequent between them I did not think it right to interfere.”).

218. *See Attempted Wife Murder and Threatened Lynching at Merced*, DAILY EVENING BULL. (S.F., Cal.), July 5, 1873, at col. G (reporting that “lynching is seriously talked of . . . and will be hard to prevent by the authorities” in the case of a policeman who attempted to kill his wife); *Mrs. Toal: Condition of the Unfortunate Woman Yesterday*, *supra* note 146, at 3 (“There has been considerable hint of lynching. Quiet officers, not easily scared, say that two or three times yesterday they thought the jail would be forced; and in case the poor woman dies, the prospect of a long rope and short shrift for her murderer would be considerable.”); *Shot for the Murder of His Mistress*, L.A. TIMES, Aug. 13, 1885, at 1 (reporting that Henry D. Banner, a man suspected of murdering his de facto wife, “was taken from the officer by a crowd of woodsmen and perforated with bullets”); *The Baynton Tragedy*, L.A. TIMES, Sept. 21, 1886, at 4 (“Saturday evening some two hundred and fifty men rendezvoused in Sonoratown for the purpose of taking [alleged wife killer] Baynton out of jail and hanging him . . .”).

219. *See* Michael Sturma, *Policing the Frontier in Mid-Nineteenth-Century Australia, Britain, and America*, in *POLICING IN AUSTRALIA: HISTORICAL PERSPECTIVES*, *supra* note 77, at 24.

percent got their count of conviction reduced to *any* lesser offense.<sup>220</sup> My numbers showed a slightly greater willingness to convict men of intimate murder in Colorado than in New York, but a lesser likelihood that the death penalty would be imposed.<sup>221</sup> I argued that condemnation of intimate-partner violence by men had spread to Colorado from the East Coast by the late nineteenth century, and indeed, that Coloradoans were especially concerned with projecting a woman-friendly image to attract respectable settler families.<sup>222</sup>

My current research on intimate-partner homicide in other parts of the American West suggests a similar pattern. States and territories seeking to shed ruffian stereotypes officially began to embrace companionate marriage and manly self-restraint in the second half of the nineteenth century, and as late as the 1920s, the distaste of California judges for the “caveman methods” of brutal husbands and lovers still echoed the values of Victorian society.<sup>223</sup> The press and courts in other Western states made similar connections between wife beating and barbarism.<sup>224</sup> Playing catch-up in the quest for respectability, the American West vigorously denounced violence against women, including its lethal forms, during the period this Article covers.

The analysis presented here is not quantitative, but it nonetheless provides evidence that male defendants were readily convicted of murder in scenarios involving jealousy, suspected infidelity, and separation. In California in the 1880s, for example, the *Williams* and *Baynton* cases resulted in penalties of life imprisonment and death, respectively, despite each defendant’s suspicion that his victim-wife had committed adultery.<sup>225</sup> Fred Aguilar received a life sentence for

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220. Ramsey, *Intimate Homicide*, *supra* note 30, at 144 & tbl.3. The data in this earlier study included a variety of family killings, such as matricide, under the rubric of “intimate homicide,” though the majority involved married couples or other sexual intimates. *See id.* at 107. The current Article deals *only* with married couples and other sexual intimates. Indeed, most of the cases discussed here involved husbands and wives.

221. *Id.* at 144, 156.

222. *Id.* at 163–64.

223. *Save Our Women*, L.A. TIMES, Mar. 17, 1923, at II4.

224. For example, an Oregon newspaper praised police judges for imposing the full penalty provided for wife beating, despite the legislature’s failure to deem this crime “a more heinous offense than ordinary assault and battery.” Editorial, THE OREGONIAN (Portland), Aug. 7, 1895, col. A, at 4. According to the editorial: “The assumption that we have outlived the age of barbarism and its rude penalties will not hold as long as bruised and beaten wives come into court asking for protection from the brawny fists and booted heels of their brutal husbands.” *Id.*

225. William Williams’s case was earlier discussed at *supra* notes 198–201 and accompanying text. For the Williams verdict and sentence, see Verdict Form (filed Nov. 16, 1887), *People v. Williams*, No. CR 000084, Superior Court of Los Angeles County, Cal., Los Angeles County Records Archive (copy on file with author); *see also For Life: Williams the Wife Murderer Gets His Dose*, *supra* note 209, at 8; *Wicked Williams: The Wife Butcher’s Trial Well Under Way*, L.A. TIMES, Nov. 16, 1887, at 1.

Albert Baynton pleaded guilty to murdering both his wife and an elderly neighbor who tried to protect her. *See Triple Murder*, L.A. TIMES, Sept. 18, 1886, at 4; *Twice Guilty*, L.A. TIMES, Oct. 2, 1886, at 4. For a report that he received a death sentence, see *November 12: Then A.G. Baynton Will Expiate His Crimes*, L.A. TIMES, Oct. 3, 1886, at 6. The reliable

first-degree murder in 1909 after he whipped his spouse to death for her alleged unfaithfulness.<sup>226</sup> Such outcomes were possible because the provocation doctrine required “serious and highly-provoking injury” to the defendant,<sup>227</sup> and for much of the period covered by this Article, California courts held that neither mere words nor suspicion of infidelity sufficed.<sup>228</sup>

A woman’s more general refusal to play a proper feminine role did not justify homicide under American law either. Men who claimed that they killed their wives for failing to cook dinner properly or meet other standards of housewifery got stern penalties.<sup>229</sup> Moreover, judges consistently refused to give manslaughter instructions in cases in which too much time elapsed between the victim’s triggering misconduct and the defendant’s act of homicide.<sup>230</sup> The rationale behind

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death penalty data gathered by M. Watt Espy and John Ortiz Smykla confirm the execution in 1886, though Espy and Smykla recorded the name as “Albert Boynton,” rather than Albert Baynton. *Executions in the United States, 1609–2002: The Espy File*, DEATH PENALTY INFORMATION CENTER, available at <http://www.deathpenaltyinfo.org/executions-us-1608-2002-espy-file> [hereinafter *Executions in the United States*].

Until 1874, the automatic penalty for murder in California was death. 1850 Cal. Stat. 231. Criminal code amendments in 1874 added “confinement in the state prison for life” as an alternative to the death penalty at the discretion of the jury (or of the trial judge in case of a guilty plea). An Act to Amend Section One Hundred and Ninety of the Penal Code, ch. 508, 20th Sess. (Cal. 1874) (collected in *Index to the Laws of California: 1850–1893*, at 457 (A.J. Johnston ed.)). Hence, the fact that Baynton pleaded guilty to murder did not automatically mean he would receive capital punishment. As the *Times* noted, the court could hear evidence and “is not forced to impose sentence of death—though the undoubtedly universal expectation and desire is that it will.” *Untitled*, L.A. TIMES, Oct. 2, 1886, at 1.

226. San Quentin Prison Register (Fred Aguilar, SQ # 23945), California State Archives, Office of the Secretary of State, Sacramento, CA (recording Aguilar’s life sentence for first-degree murder) (copy on file with author); see *Guilty of Wife Murder*, L.A. TIMES, Nov. 17, 1909, at 15.

227. *People v. Mendenhall*, 67 P. 325, 326 (Cal. 1902).

228. See *People v. Arnold*, 48 P. 803, 803–04 (Cal. 1897) (“While ‘the sight of adultery committed by his wife’ may be . . . provocation to the husband which will justify that ‘heat of passion’ which is sufficient to reduce murder to manslaughter, the knowledge of such fact must be based upon something more tangible than mere surmise, and the knowledge must be so recent as to preclude the idea of cooling time or premeditation.”); *People v. Turley*, 50 Cal. 469, 470 (1875) (affirming the denial of a heat-of-passion instruction for a defendant who claimed to have been provoked by “words of reproach only”); see also CHARLES H. FAIRALL, *CRIMINAL LAW AND PROCEDURE OF CALIFORNIA INCLUDING THE PENAL CODE OF CALIFORNIA* 276 (1906) (stating that “[w]ords of reproach, however grievous [sic],” did not constitute sufficient provocation in California).

229. See *Forty-Five Years in Prison*, DAILY EVENING BULL. (S.F., Cal.), Apr. 14, 1876, at col. C (defendant got a forty-five year sentence for second-degree murder for kicking his wife to death when she burned his fish dinner); see also *Ghost Story’s Climax Today*, L.A. TIMES, Jan. 23, 1917, at III (immigrant defendant pleaded guilty to murder and was life-sentenced for killing his flirtatious wife because she failed “to act as a German hausfrau”); *On Trial for Wife Murder*, DAILY EVENING BULL. (S.F., Cal.), June 24, 1880, col. I, at 3 (defendant Edward Williams tried for murdering his spouse, who refused to quit her life of prostitution); *Criminal Business—Superior Court*, DAILY EVENING BULL. (S.F., Cal.), June 28, 1880, col. F, at 3 (reporting Williams’s murder conviction).

230. See, e.g., *People v. Ashland*, 128 P. 798, 801–03 (Cal. Dist. Ct. App. 1912) (affirming the denial of a manslaughter instruction for a homicide committed seventeen

such a restriction was that the passage of time converted sudden rage or fear to deliberate revenge.<sup>231</sup>

Although my prior research showed that capital punishment in intimate-partner murder cases constituted a much lower percentage of total executions in Colorado than in New York,<sup>232</sup> western states continued to execute some wife killers into the twentieth century. Such prisoners included men who cited sexual betrayal as the reason for their murderous rage. For instance, Jeremiah Allen went to the gallows at San Quentin in 1914 for the Christmas Eve slaying of his wife, whom he suspected of having a lover and engaging in prostitution.<sup>233</sup> “[J]ealous of a paramour who had taken her back to the old life [of shame], he hunted her out . . . and killed her,” the *Los Angeles Times* reported.<sup>234</sup> Despite telling a story that might lead to manslaughter mitigation today, he “paid with his life” for using lethal violence to prevent his spouse from leaving him.<sup>235</sup>

Perhaps because the provocation doctrine had narrower bounds in the late 1800s and early 1900s than it does in the twenty-first century,<sup>236</sup> men who killed their wives or girlfriends relied primarily on the insanity defense.<sup>237</sup> Yet the murder conviction of male defendants who pleaded insanity was a common occurrence in the American West, even when infidelity, separation, or other displays of female autonomy were also alleged.<sup>238</sup> California courts applied the cognitive *M’Naughten*

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hours after the defendant learned the deceased had raped or seduced his wife); *People v. Smith*, 26 Cal. 665, 667–68 (1864) (holding that the six-hour time lapse between the defendant’s stabbing of the deceased and a previous fight between them precluded a provocation claim as a matter of law).

231. *Smith*, 26 Cal. at 668.

232. Ramsey, *Intimate Homicide*, *supra* note 30, at 156 & tbls.4–5.

233. *People v. Allen*, 166 Cal. 723, 724–25 (1913); *Executions in the United States*, *supra* note 225 (recording the execution of “Jerry Allen” in 1914).

234. *Wife Murderer Hanged*, L.A. TIMES, Apr. 11, 1914, at II9.

235. *Id.*

236. See Ramsey, *Intimate Homicide*, *supra* note 30, at 146–47, 151; Ramsey, *Provoking Change*, *supra* note 43, at 42–51, 54–57. There were, of course, exceptions to the rule that only men who killed immediately upon witnessing a wife’s adultery, or whose cases fit into another traditional provocation category, could obtain manslaughter mitigation. In 1877, for instance, a California jury found Civil War veteran John Velbert guilty of manslaughter, not murder, for killing his wife, whose suspected infidelities obsessed him over time. Sentencing Velbert to a mere two years in state prison, the judge explained that “the case was a very unfortunate one, and one which appealed to the sympathy, particularly of the Court” and that the “circumstances which excited the prisoner were of such a character that perhaps few men could resist.” *Velbert’s Sentence*, DAILY EVENING BULL. (S.F., Cal.), Dec. 3, 1877, at col. E; see *Velbert’s Trial for Murder*, DAILY EVENING BULL. (S.F., Cal.), Oct. 25, 1877, at col. C (describing how his wife’s alleged unfaithfulness “preyed upon him to such an extent that his acquaintances thought him crazy”).

237. See, e.g., *infra* notes 241–49 and accompanying text (discussing the *Calzada* case) and note 250 (mentioning other men who were convicted of murdering their wives, despite pleading insanity). Of course, claiming insanity carried the possibility of acquittal, whereas a successful provocation theory led only to manslaughter mitigation. It is thus possible that defense lawyers simply concentrated on the theory most likely to keep their clients out of prison.

238. Ramsey, *Intimate Homicide*, *supra* note 30, at 154 (discussing unsuccessful defenses based on insanity, epilepsy, and incompetence to stand trial in late nineteenth- and early

test for legal insanity and would not excuse a criminal defendant from responsibility based on volitional impairment; indeed, impulsive men who lacked the willpower to avoid criminal behavior were deemed the most in need of restraint through fear of punishment.<sup>239</sup>

California judges viewed the insanity defense with distrust,<sup>240</sup> and juries seem to have done the same. After deliberating for only twenty minutes, for instance, a California jury found Francisco Calzada guilty of first-degree murder in 1888, despite his defense of insanity and epileptic mania.<sup>241</sup> The facts of the case were those of a separation killing. The defendant fatally shot his wife after she left the abusive marriage, refused to give him custody of their children, and began a new relationship with another man.<sup>242</sup> Calzada was sentenced to a life term in Folsom State Prison.<sup>243</sup> While the judge gave the defendant some hope of commutation, he also criticized his cowardice and noted the strict cooling-time limit on the provocation doctrine, which precluded Calzada from obtaining manslaughter mitigation as an alternative to his insanity defense:

[I]f you were determined to proceed to desperate measures—I say, if you could see no other way of saving your children—more courage would have been displayed in killing the despoiler of your home and the virtue of your wife. The taking the life of a woman is cowardly, and when a man appeals to that higher law—and in so doing runs the risk of the gallows—it would be more in keeping to carry his deadly purpose into effect when the offense is first committed . . . .<sup>244</sup>

The judge alluded here to the “unwritten law” that historically justified a man’s killing of his wife’s paramour<sup>245</sup> and distinguished such a killing from wife murder, which nineteenth-century society condemned, except in the narrow circumstances designated for heat-of-passion mitigation. Although the bench also cast the female victim as a wrongdoer, neighbors and journalists were more sympathetic to her.

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twentieth-century Colorado).

239. FAIRALL, *supra* note 228, at 41–42. The *M’Naughten* test provided that legal insanity

must be such that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of mind, as not to know the nature or quality of the act, or if he did know it, that he did not know he was doing what was wrong.

*Id.* at 38.

240. *Id.* at 37–38.

241. See Verdict Form (filed Mar. 31, 1888), *People v. Calzada*, No. CR 000081, Superior Court of Los Angeles County, Cal., Los Angeles County Records Archive (copy on file with author); *Calzada Convicted*, L.A. TIMES, Apr. 1, 1888, at 8.

242. *The Wife Murderer: Francisco Calzada, Who Shot His Wife Full of Lead*, L.A. TIMES, Mar. 28, 1888, at 2.

243. See Verdict Form (filed Mar. 31, 1888), *People v. Calzada*, *supra* note 241.

244. *For Life: Murderer Calzada Goes to Folsom for His Natural Life*, L.A. TIMES, Apr. 5, 1888, at 8.

245. HARTOG, *supra* note 17, at 218–41; PETTEGREW, *supra* note 3, at 297–304; see also *infra* notes 401–33 and accompanying text (discussing the decline of the “unwritten law” for men and the continued existence of a corollary doctrine sparing wronged women who killed their abusers).

Newspaper articles on the case reported that Calzada paid no attention to his estranged family “except when he came to pick a quarrel with his wife” and that he committed a premeditated revenge killing after inflicting years of abuse.<sup>246</sup>

Press coverage of the *Calzada* case featured racist images of the Mexican defendant as stereotypically passionate and ferocious, yet calculating in his retaliation.<sup>247</sup> Negative clichés about foreign men’s animalistic behavior also suffused the trials of defendants of color in Australia, and at least one scholar has suggested that Australian juries declined to recommend mercy for dark-skinned males.<sup>248</sup> My sparse findings on race and ethnicity preclude ruling out anti-Hispanic discrimination as a factor in the *Calzada* case. However, the insanity claim and the guilty verdict in *Calzada* were also typical of intimate-partner homicides involving non-Hispanic male defendants during the same time period.<sup>249</sup> Conversely, some Hispanics and Indians obtained manslaughter mitigation in the American West, and some aboriginal males escaped murder convictions in Australia.<sup>250</sup>

246. *The Wife Murderer: Francisco Calzada, Who Shot His Wife Full of Lead*, *supra* note 242, at 2.

247. According to the *Los Angeles Times*:

Both the murderer and his victim were of the Spanish race, and with the passionate intensity of feeling seemingly characteristic of that southern land, the murderer not only carried his fell purpose into effect with ferocity, but afterward, by the confession of having previously planned the murderous assault, gloried in his [infamy].

*Id.*

248. See Strange, *supra* note 45, at 316, 328. However, at least one case that Strange discusses—that of Asian defendant Daniel Ligores—appears to have resulted in a recommendation of mercy from the jury. Coversheet, *Rex v. Ligores*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7251 (1920, Central), SRNSW (copy on file with author) (noting the mercy rider). For more on the *Ligores* case, see *infra* note 293.

249. For example, in 1879, George Messersmith (a.k.a. George M. Smith) received a death sentence for murdering his estranged wife when she refused to reunite with him. *Messersmith Sentenced to Be Hanged*, DAILY EVENING BULL. (S.F., Cal.), May 30, 1879, at col. D; see also *On Trial for Wife Murder*, DAILY EVENING BULL. (S.F., Cal.), Apr. 22, 1879, at col. D (recounting the circumstances of the murder). But cf. *Executions in the United States*, *supra* note 225 (indicating, by omission, that Messersmith was not actually executed). Although Messersmith raised an insanity defense, the jury apparently felt no mercy for him, perhaps because it credited testimony he was neglectful, cruel, and physically abusive toward the victim. *Messersmith Sentenced to Be Hanged*, *supra*. Fifteen years later, insanity defenses proved similarly unavailing to California men charged with using lethal violence to prevent their wives from leaving. A jury rapidly rejected Thomas Gardner’s insanity defense to murder in 1916, for instance. The trial judge excluded much of the psychiatric testimony offered by both sides, and jurors apparently believed the prosecutor’s characterization of the crime as “ruthless and coldblooded.” *Son Is Guilty; Mother Faints*, L.A. TIMES, May 26, 1916, at II2.

For a discussion of the limits of the insanity defense in sparing male murder defendants in Australia, see *infra* notes 252–56, 292 and accompanying text.

250. See, e.g., Untitled, L.A. TIMES, Oct. 2, 1885, at 1 (reporting that the jury compromised with a manslaughter verdict for a Hispanic male murder defendant, Loreto Robles, who claimed insanity); *Law Report: Supreme Court: The Queen v. Jemmy (One of*

## b. Australian Cases

From the mid-1800s through the early 1900s, Australian males faced the prospect of a substantial prison sentence or even the death penalty for murdering women who tried to leave them. Indeed, because statutory law mandated capital punishment for murder, those convicted had to rely on the mercy of governor.<sup>251</sup> Many of these prisoners raised unsuccessful insanity defenses at trial. Australian courts, like those in California, strictly applied the *M'Naughten* standard and tended to judge wife killers with mental problems harshly.<sup>252</sup> For instance, Demetrius Morfessie was convicted of killing his allegedly unfaithful wife Bridget with an axe.<sup>253</sup> He was initially found incompetent to plead but was subsequently tried and convicted of capital murder in 1915, despite his claim to have been insane at the time of the offense.<sup>254</sup> Although his commuted sentence of ten years with hard labor paled by comparison to the life terms that many other Australian wife killers served,<sup>255</sup> the capital case file reveals a great deal of contempt for him.

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*the Aborigines*), ARGUS (Melbourne, Austl.), Sept. 7, 1860, at 5 (noting that an aboriginal defendant charged with murdering an aboriginal woman, "his lubra," had been found guilty of manslaughter and sentenced to only one year in prison in Victoria).

Courts in both regions expressed doubts about their jurisdiction over native peoples, and the legal standards applicable to them, which may have affected the relatively lenient outcomes for some indigenous defendants. See CASTLES, *supra* note 78, at 526–32 (discussing the slow acceptance in Australia of the view that aborigines were subject to British law); Coll-Peter Thrush & Robert H. Keller, Jr., "I See What I Have Done": *The Life and Murder Trial of Xwelas, a S'Klallam Woman*, in WRITING THE RANGE: RACE, CLASS, AND CULTURE IN THE WOMEN'S WEST 172, 183 (Elizabeth Jameson & Susan Armitage eds., 1997) (speculating that confusion over the legal standards applicable to Native Americans in the Washington Territory in the 1870s may have led to manslaughter mitigation for an indigenous woman charged with murdering her white husband).

251. See GURNER, *supra* note 78, at 171 ("[I]n cases of murder, it is the judge's duty to pass sentence of death upon the accused . . . ." (citing 27 Vict., No. 233, § 315)); PLUNKETT & WILKINSON (1860), *supra* note 69, at 28 (citing 1 Vic., c. 85, s. 2) (noting the mandatory death penalty for murder in New South Wales); WILKINSON ET AL. (1903), *supra* note 78, at 177 (citing Crimes Act, No. 40, 1900, s. 19) (same); WILKINSON ET AL. (1894), *supra* note 79, at 145 (citing 46 Vic., No. 17, s. 9) (same).

252. GURNER, *supra* note 78, at 118–21 (discussing the applicability to the colony of Victoria of the *M'Naughten* insanity standard, which required the jury to find that the defendant did not know the nature and quality of his act or its wrongfulness at the time of the crime); WOODS, *supra* note 14, at 162 (noting that no diminished responsibility defense was available in New South Wales until 1974).

253. See generally Victoria Capital Case Files, Unit 29 (Morfessie, 1915), VPRS 264/P0, PROV (copy on file with author) (providing details of Morfessie's conviction for murder).

254. Solicitor-General's Memorandum, Rex v. Morfessie, Capital Case Files, Unit 29 (Morfessie, 1915), VPRS 264/P0, PROV (explaining why the trial was delayed until 1915); Register of Decisions on Capital Sentences, 1889–1944, VPRS 7583/P0001/2, PROV (recording commutation of Morfessie's death sentence).

255. See Solicitor-General's Memorandum, Rex. v. Morfessie, *supra* note 254 (copy on file with author) (noting Morfessie's commuted sentence), and *supra* notes 202–07 and accompanying text (discussing the *Solomon* case).

According to a police report, Morfessie was a “coward” whose poor family went about in rags and whose wife repeatedly sought to leave him.<sup>256</sup>

Australian men who habitually beat their spouses before murdering them tended to get particularly stern treatment, even if their victims were not irreproachable by nineteenth-century standards. For example, a miner named John McDonald was executed in Victoria in 1860 for fatally assaulting his wife with a knife and an iron bar.<sup>257</sup> The criminal case file indicates that he routinely beat his wife and that their quarrels were a daily occurrence.<sup>258</sup> McDonald blamed alcohol for his crime, claiming he suffered delirium tremens.<sup>259</sup> His victim also drank heavily, and she had been “before the bench for drunkenness” immediately prior to her death.<sup>260</sup> McDonald was nevertheless convicted of murder.<sup>261</sup> Although the jury recommended mercy,<sup>262</sup> he became one of the few intimate murderers actually hanged for his crime after the end of the convict era.<sup>263</sup> McDonald pretended he came to Australia as a free man, but he had in fact spent sixteen years as a convict in Van Diemen’s Land.<sup>264</sup> Despite his efforts to hide his convict origins, he received capital punishment for failing to live up to the respectable family ideal that had begun to be advocated in Australia by mid-century.

## 2. Avenues to Mercy

I shall argue that Australian juries and legal authorities exhibited greater empathy for men charged with killing under circumstances of separation or wifely insubordination than did their American counterparts. Yet, in both Australia and the United States, a male defendant’s case often resulted in a dismissal, acquittal, or

256. Report of A.E. Hesford, Kilmore Station, Bourke Police District, Nov. 11, 1915, Victoria Capital Case Files, Unit 29 (Morfessie, 1915), VPRS 264/P0, PROV (copy on file with author).

257. Register of Decisions on Capital Sentences, 1851–1889, VPRS 7583/P0001/1, PROV (recording McDonald’s execution); *see also* Untitled, ARGUS (Melbourne, Austl.), Sept. 4, 1860, at 4 (“The man McDonald, lately convicted of the murder of his wife, under circumstances of peculiar atrocity, at Ironbark Gully, Bendigo, was executed yesterday morning . . .”); Untitled, ARGUS (Melbourne, Austl.), Aug. 4, 1860 at 5 (stating that McDonald, a former sailor, “had been digging at Ironbark”).

258. *See* Depositions of Alfred McDonald and James McDonald, Coroner’s Inquest, Queen v. McDonald, Case 3-347-26, Unit 137 (1860), Criminal Trial Briefs, VPRS 30/P/0, PROV (copy on file with author).

259. Untitled, ARGUS (Melbourne, Austl.), Sept. 4, 1860, at 4.

260. *Barbarous Murder at Ironbark Gully*, ARGUS (Melbourne, Austl.), Aug. 4, 1860, at 7 (recounting the victim’s past arrest for drunkenness); *see also* Deposition of Alfred McDonald, Coroner’s Inquest, Queen v. McDonald, *supra* note 258 (stating that the victim had been released from the watch-house at Sandhurst the day before she was murdered).

261. *See supra* note 257, *infra* notes 262–63 (documenting McDonald’s murder conviction and execution).

262. *See* Coversheet, Queen v. McDonald, Case 3-347-26, Unit 137 (1860), Criminal Trial Briefs, VPRS 30/P/0, PROV (copy on file with author).

263. *See infra* notes 295–96 and accompanying text (discussing the relatively small percentage of intimate murderers who actually received capital punishment).

264. Untitled, ARGUS (Melbourne, Austl.), Sept. 4, 1860, at 4.



conviction for manslaughter (instead of murder) if it involved the supposedly inadvertent killing of a woman with a preexisting vulnerability. Prosecutors had difficulty proving the cause of death when the autopsy indicated that the beating merely exacerbated a medical condition caused by the victim's disease or habitual drunkenness.<sup>265</sup>

In Australia—where respectable men seem to have believed in the wife-beating prerogative longer than they did in the United States—the line between murder and accident was especially faint. *Queen v. Price*, a case from 1860, provides an illustration. *Price* involved an older woman in Victoria who became ill and partially paralyzed after her husband abused her.<sup>266</sup> When she subsequently died, a criminal case ensued, and William Price was tried for manslaughter.<sup>267</sup> The couple's son testified, "my father was not in the habit of beating my mother, but when in drink he might give her [a] push."<sup>268</sup> Indeed, such a push from William allegedly caused "a[n] effusion of serum at the [b]lack of the brain" that killed Ann Price.<sup>269</sup> The Crown Prosecutor conceded this type of manslaughter was "little removed from accidental homicide," however, and said "the prisoner had his sympathy."<sup>270</sup> Witness testimony convinced him that the prisoner "had been uniformly kind and humane to his wife; and the law allowed husbands to

265. *See Is It Murder or Disease?*, L.A. TIMES, June 2, 1886, at 1 (reporting that, according to the coroner, Josefa Celier "[came] to her death from pneumonia superinduced by blows given her by her [de facto] husband [Emanuel Miranda]"); *The Courts*, L.A. TIMES, June 22, 1886, at 3 (noting that Emanuel Miranda was discharged). *See generally* *Queen v. Robertson*, Case 11, Unit 299 (1866), Criminal Trial Briefs, VPRS 30/P/0, PROV (copy on file with author) (recording a directed verdict of acquittal where the drunken victim died from a blow, but there was insufficient evidence of how she received it). The *Robertson* case "broke down through the principal witness, a girl named Mary Campbell, about seven years of age, not being considered by the Court a competent witness." *Wilful Murder*, ARGUS (Melbourne, Austl.), Oct. 4, 1866, at 6. Robertson had been accused of murder, but in other cases, a dearth of evidence pinpointing the defendant's violence as the cause of death prompted the government to charge manslaughter, instead of murder. *See* *Coversheet*, *Queen v. Balmer*, Case 12, Unit 254 (1862), Criminal Trial Briefs, VPRS 30/P/0, PROV (copy on file with author) (noting manslaughter charge); Deposition of Charles Mackin, surgeon, *Queen v. Balmer*, *supra* (opining that the victim's death was "attributable to exhaustion consequent on mania accelerated by the injuries received [from beatings by the defendant]"); *see also* Ramsey, *Intimate Homicide*, *supra* note 30, at 114–16 (noting that the rare instances in which American prosecutors charged wife killers with manslaughter, instead of murder, typically involved beating victims who drank excessively or had other preexisting vulnerabilities).

266. Deposition of William Price, Jr., Coroner's Inquest, *Queen v. Price*, Case 3-276-11, Unit 125 (1860), Criminal Trial Briefs, VPRS 30/P/0, PROV (copy on file with author).

267. *See Manslaughter*, ARGUS (Melbourne, Austl.), Feb. 6, 1860, at 7.

268. Deposition of William Price, Jr., Coroner's Inquest, *Queen v. Price*, *supra* note 266.

269. Deposition of Dr. Eustace James Walshe, Coroner's Inquest, *Queen v. Price*, Case 3-276-11, Unit 125 (1860), Criminal Trial Briefs, VPRS 30/P/0, PROV (copy on file with author).

270. *Manslaughter*, *supra* note 267 (paraphrasing the prosecutor's address to the jury).

administer corporal chastisement, to a certain degree, to their wives.”<sup>271</sup> Price was acquitted by directed verdict.<sup>272</sup>

The release of alleged wife murderers due to a failure of proof was controversial. The *Argus* newspaper said of another male defendant whom a jury acquitted of wife murder the same year as Price:

It is evident that, if the prisoner did not actually murder the unfortunate woman, he, by his inhuman treatment, drove her mad, and occasioned her to commit suicide, by throwing herself down a well over 70 feet deep. Such a fellow, under any circumstances, deserves to be punished.<sup>273</sup>

Some victims inspired less sympathy, however. Australian women who recalled the stereotype of the crude, drunken, promiscuous female convict<sup>274</sup> might be deemed to have incited men to a homicidal frenzy. American courts and juries rarely found husbands eligible for manslaughter mitigation if they killed their wives for any misconduct short of adultery they had actually witnessed.<sup>275</sup> Mitigation in Australia, by contrast, occasionally stemmed from the view that female insubordination or inconstancy provoked the attack. For example, in 1862, a jury found murder defendant Nathaniel Gardiner guilty of the lesser offense of manslaughter for killing his wife when she failed to cook his dinner.<sup>276</sup> He received a paltry three-month sentence, reflecting not only the court’s acknowledgement of

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271. *Id.* A treatise published in New South Wales in the late nineteenth century stated that “where in a case of beating, by a master or teacher, for example, the circumstances show only an intent reasonably to chastise, or not materially to injure, the homicide would at most be manslaughter, and might be misadventure merely.” WILKINSON ET AL. (1894), *supra* note 79, at 148 (further noting that if a woman died because a broomstick had been thrown at her, such a killing would be manslaughter, but if she were struck with an instrument likely to cause death, it would be murder). However, the discussion of lawful domestic correction elsewhere in the same treatise does not include wife beating among its examples of justified battery. *See id.* at 37. This omission dated back at least as far as 1860, suggesting that the right of moderate chastisement of wives had been abrogated or was at least contested at the time. *See* PLUNKETT & WILKINSON (1860), *supra* note 69, at 23. *But cf.* *People v. Munn*, 3 P. 650, 651 (Cal. 1884) (citing *Commonwealth v. McAfee*, 108 Mass. 458 (1871)) (indicating that, in some American states, the formal law was that a man who killed his wife accidentally during a beating was guilty only of manslaughter, even though the blows were illegal).

272. Coversheet, *Queen v. Price*, Case 3-276-11, Unit 125 (1860), Criminal Trial Briefs, VPRS 30/P/0, PROV (copy on file with author); *see also Manslaughter*, *supra* note 267 (“His Honour directed the jury to acquit the prisoner, and he was discharged.”).

273. *The Supposed Murder in the New Township*, ARGUS (Melbourne, Austl.), April 30, 1860, at 5. For the neighbors’ efforts to shelter the abused woman prior to her death, *see supra* note 216 and accompanying text.

274. HUGHES, *supra* note 14, at 244, 249.

275. *See supra* notes 225–36 and accompanying text.

276. *See* Untitled, ARGUS (Melbourne, Austl.), Dec. 18, 1862, at 5 (reporting Gardiner’s conviction and sentence). The couple’s son testified: “My mother was tipsy, and she had no dinner or anything. My mother then began ‘aggravating’ and ‘jawing’ [my father].” *Wife Murder*, ARGUS (Melbourne, Austl.), Dec. 19, 1862 at 7.

his remorse and his responsibility toward multiple children, but also its view that he had been pushed beyond self-control by an impudent, neglectful, and habitually drunk spouse.<sup>277</sup> Drinking was not a sex-neutral activity; rather, working-class and middle-class men shared the view that a woman who drank or was drunk, especially in public, posed a challenge to her husband's authority.<sup>278</sup>

Increasing female independence—made possible by paid work, the extension of divorce law, and the reduction of family size—also threatened male prerogatives. Thus, in the wake of World War I, more than a half-century after the *Gardiner* case, an Australian woman's failure to be nurturing and faithful still partially legitimized her husband's homicidal violence in the eyes of some courts and juries. If the deceased had deserted a war veteran, her misconduct might seem especially disloyal.<sup>279</sup> The case of *Rex v. Collins* provides an apt illustration. Harold Collins, "a returned soldier . . . [who] was badly injured at the war," fatally shot his wife Mollie in 1925.<sup>280</sup> Mollie had been convicted of marrying Collins under bigamous circumstances; she maintained a separate residence and was going out with other men when Collins killed her.<sup>281</sup> Though Collins faced a murder charge, the jury convicted him of manslaughter with a recommendation to mercy "on account of previous good character," and he was sentenced to just three years of penal servitude.<sup>282</sup>

Australian men who became enraged at their female partners' violation of gender norms thus seem to have received more sympathy than their American counterparts. Male defendants who raised insanity claims also fared better in Australia. Indeed, my research unearthed Australian cases from the 1860s through the early twentieth century in which men were acquitted on grounds of insanity for killings arguably driven by sexual jealousy and a desire for control. For example, after Simon Houliahan served a jail term at Ballarat, Victoria, for an unspecified

277. Untitled, *ARGUS* (Melbourne, Austl.), Dec. 18, 1862, at 5. Even if a judge allowed a provocation claim based on insubordination to go to the jury, he might still take a dim view of the defendant's overreaction to female misconduct. Hence, a man in Victoria received a fifteen-year sentence—the maximum for manslaughter—for fatally striking his wife with a wooden plank when she insisted, against his wishes, on going to the store. The crime was neither justifiable nor excusable in the court's eyes, but the court concurred with the jury that the defendant had not formed premeditated intent to kill. See *Murder of a Wife*, *ARGUS* (Melbourne, Austl.), Feb. 16, 1884, at 7; *Central Criminal Court: Sentences*, *ARGUS* (Melbourne, Austl.), Feb. 18, 1884, at 10.

278. Allen, *'Mundane' Men*, *supra* note 48, at 623.

279. See ALLEN, *SEX AND SECRETS*, *supra* note 15, at 136–38 (arguing that the interwar period brought much sympathy and higher rates of manslaughter mitigation for veterans homicidally enraged by their wives' infidelity or desire for divorce).

280. Memo of Police Sergeant J.J. Lynch, *Rex v. Collins*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7288 (1925, Central), SRNSW (copy on file with author) (noting the defendant's veteran status).

281. See Depositions of Albert Arthur Lawrence and Doris Ida May Germyn, Coroner's Inquest at 6–7, 12 *Rex v. Collins*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7288 (1925, Central), SRNSW (copy on file with author) (describing the victim's alleged misconduct).

282. Clerk of the Peace, Register of Cases Heard in Central Criminal Court, 19/13210, at 202, SRNSW (copy on file with author) (recording *Collins* case outcome).

offense, he imagined that his wife had taken a lover and that they were plotting to kill him.<sup>283</sup> He began to carry a shearing blade attached to a stick, ostensibly for self-protection, and he eventually stabbed his wife in the abdomen with it.<sup>284</sup> In 1862, a jury found him not guilty of murder on grounds of insanity.<sup>285</sup>

Such cases of acquittal or manslaughter mitigation for provoked or insane men constituted outliers, however. The more common route to mercy for male defendants lay in executive commutation.<sup>286</sup> This was because both heat of passion and insanity were construed narrowly. Legally adequate provocation still required justified anger in the late 1800s and early 1900s, even though the defense was increasingly characterized as a partial excuse for loss of self-control.<sup>287</sup> A judge was supposed to direct jurors that, as a matter of law, they could not reduce a murder charge to manslaughter if no evidence showed adequate provocation.<sup>288</sup> Cases falling into grey areas went to the jury, subject to judicial comments and advice.<sup>289</sup> However, for the most part, Australian courts (like their American counterparts) gave the provocation doctrine a narrow interpretation and found few types of victim behavior that qualified. Even after juries in New South Wales were allowed by statute to hear provocation claims based on “grossly insulting language or gestures on the part of the deceased,” such behavior was deemed provoking only “in certain exceptional cases.”<sup>290</sup> The law ordained that, when considering whether the defendant’s act was proportional to the alleged provocation, “a ferocious excess of violence, far beyond what the particular provocation called for . . . shall not be held justifiable, but shall be accounted murder.”<sup>291</sup> The strict *M’Naughten* test for insanity further constrained defendants’ ability to escape a murder conviction.<sup>292</sup> Thus, contrary to the lenient outcomes in the *Collins* and *Houliahan* cases, men were often found guilty of murder in circumstances of suspected infidelity.<sup>293</sup>

283. Depositions of Constable Alexander Dempster and Thomas Wegly, *Queen v. Houliahan*, Case 3, Unit 247 (1862), Criminal Trial Briefs, VPRS 30/P/0, PROV (copy on file with author).

284. Depositions of William Currie and Thomas Wegly, *Queen v. Houliahan*, Case 3, Unit 247 (1862), Criminal Trial Briefs, VPRS 30/P/0, PROV (copy on file with author).

285. See Coversheet, *Queen v. Houliahan*, Case 3, Unit 247 (1862), Criminal Trial Briefs, VPRS 30/P/0, PROV (copy on file with author). Early in the next century, Walter Lovett obtained an NGRI acquittal in New South Wales when he fatally shot his wife, who had separated from him and earned her own living. See *Murder Charge Fails: Husband Not Guilty*, ARGUS (Melbourne, Austl.), Sept. 10, 1910, at 19 (describing Lovett as “very jealous”).

286. See *infra* notes 295–96 (discussing executive commutation).

287. Ramsey, *Provoking Change*, *supra* note 43, at 49, 54–55.

288. See WILKINSON ET AL. (1903), *supra* note 78, at 182.

289. PLUNKETT & WILKINSON (1860), *supra* note 69, at 310.

290. WILKINSON ET AL. (1894), *supra* note 79, at 254–55 (citing 46 Vic., No. 17, s. 370).

291. PLUNKETT & WILKINSON (1860), *supra* note 69, at 310.

292. See *supra* note 252 (discussing the insanity standard in Victoria and New South Wales).

293. For instance, a New South Wales jury convicted Charles Jenkins of murder for shooting his estranged wife Jemima after he threatened her life and bragged to her that he could “get a woman as well as you [Jemima] can get a man.” Deposition of Mary Wilson, Coroner’s Inquest at 28, *Rex v. Jenkins*, *supra* note 156; see Coversheet, *Rex v. Jenkins*,

Prosecutors and judges in the late nineteenth and early twentieth centuries reminded such men that they had no right to use violence, instead of divorce, as a solution to cuckoldry.<sup>294</sup>

When Australian juries convicted provoked, disturbed, or despondent men of murder, a mercy rider was often attached to the verdict, and the executive commuted the mandatory death sentence to life imprisonment.<sup>295</sup> Outcomes of this type predominated in femicide cases in New South Wales and Victoria.<sup>296</sup> Still, mercy at the punishment stage did not negate the expressive power of a murder conviction, nor did it preclude judges and journalists from making denunciatory statements to clarify that killing a woman was wrongful and that male anger, jealousy, or depression triggered by most types of female misconduct were insufficient to reduce murder to manslaughter.

## II. FEMALE DEFENDANTS AND JUSTIFIABLE HOMICIDE

As we have seen, courts and juries had some understanding of abused women's limited options, and they viewed brutal husbands as wrongdoers.<sup>297</sup> Hence, they showed sympathy for female murder defendants' claims of self-defense and desertion. In Colorado in the late nineteenth and early twentieth centuries, for example, women had a greater likelihood of being acquitted of murder charges than being convicted of either murder or a lesser offense.<sup>298</sup> Quantitative data from New South Wales in the late 1800s indicates a somewhat higher rate of conviction for Australian women. Nonetheless, only slightly fewer than half of all female murder defendants were acquitted in a Sydney suburb during the late nineteenth century,<sup>299</sup>

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Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7204 (1915, Bathurst), SRNSW (copy on file with author) (recording the verdict). In another case, an Asian defendant, Daniel Ligores, became homicidally obsessed with his wife's involvement in a free love society. Although at least one trial witnesses thought Ligores was justified in being angry, the jury convicted him of murder. Deposition of Herbert Walter Teesdale Atkinson, Coroner's Inquest at 16–19, *Rex v. Ligores*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7251 (1920, Central); see Coversheet, *Rex v. Ligores*, SRNSW, *supra* note 248 (recording the verdict).

294. See *Strange*, *supra* note 45, at 328–29.

295. See *id.* at 311–15.

296. In the period *Strange* studied (1880–1920), only six male defendants out of sixty-four convicted of femicide or attempted femicide were actually executed. *Id.* at 316. Most men who killed their female intimates ultimately received life sentences. See *id.* at 315–16. For examples from nineteenth- and early twentieth-century Victoria, see e.g., Register of Decisions on Capital Sentences, 1851–1889 VPRS 7583/P0001/1, PROV (recording the commutation of the death sentence for William Smith in 1860 to life imprisonment with hard labor and three years in irons); Register of Decisions on Capital Sentences, 1889–1944, VPRS 7583/P0001/2, PROV (recording that Demetrius Morfessie's capital sentence was commuted to ten years in prison with hard labor in 1915). Death sentences for Australian women were almost uniformly commuted to a prison term, as well. See, e.g., *infra* notes 366, 395 and accompanying text.

297. See *supra* Part I.B.

298. See Ramsey, *Intimate Homicide*, *supra* note 30, at 122–23 & tbl.2 (presenting data from Denver/Arapahoe County, Colorado).

299. ALLEN, SEX AND SECRETS, *supra* note 15, at 40–41 (presenting data from Newtown,

and women were practically never executed in either part of the world during the time period studied in this Article.<sup>300</sup> Most importantly, female defendants charged with murdering their batterers could more successfully claim self-defense than the existing scholarship implies.<sup>301</sup>

#### *A. Insanity: The Presumed Defense for Women?*

Like modern scholars, nineteenth- and early twentieth-century observers often ascribed the acquittal of female defendants to the success of insanity claims or to a general reluctance to impose the death penalty on women. American newspapers reported prosecutorial frustration at voir dire arising from the unwillingness of prospective jurors to convict females of capital crimes.<sup>302</sup> Similarly, the mandatory death penalty for murder in New South Wales was thought to produce jury nullification in women's cases.<sup>303</sup>

Nineteenth-century observers also blamed psychiatric testimony for the acquittal of female defendants who had allegedly committed cold-blooded, premeditated murders. For example, Melbourne's *Age* newspaper opined that, in women's cases, "[m]edical men are always arrogating to themselves the right to say what is and what is not madness; and yet the majority of them have made no special study of the complex issues involved in it."<sup>304</sup> Many historians have emphasized this conflation of female criminality and female lunacy,<sup>305</sup> noting that nineteenth-century medical discourse "figured female bodies as variously disordered, diseased and desiring" and that women were thought to exhibit a natural tendency toward

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New South Wales).

300. See Ramsey, *Intimate Homicide*, *supra* note 30, at 131–32, 159 tbl.5; Strange, *supra* note 45, at 316 & tbl.1.

301. For example, an otherwise excellent chapter on the murder trial of an Indian woman for killing her white husband in the late nineteenth-century Washington Territory assumes that "[d]uring this period in the American West, no legal precedents existed that took into account as justification for homicide domestic violence against women." Thrush & Keller, *supra* note 250, at 182.

302. See, e.g., *Accused of Killing Husband*, L.A. TIMES, Jan. 31, 1922, at III ("The day was spent in selecting the jury [for the murder trial of Julia Lee Johnstone], but as many of the panel balked on inflicting the death penalty on a woman, considerable time was taken up."). Squeamishness about capital punishment for women in the American West resonated with the reluctance of prospective jurors in northeastern states like New York to sit in judgment on female murder defendants. See Ramsey, *Intimate Homicide*, *supra* note 30, at 123.

303. See ALLEN, *SEX AND SECRETS*, *supra* note 15, at 113.

304. Editorial, *AGE* (Melbourne, Austl.), Sept. 9, 1899, at 8.

305. See Cathy Coleborn, *Legislating Lunacy and the Female Lunatic Body in Nineteenth-Century Victoria*, in *SEX, POWER, AND JUSTICE: HISTORICAL PERSPECTIVES ON LAW IN AUSTRALIA*, *supra* note 34, at 86, 94; see also Ball, *supra* note 47, at 98 (contending that, since frontier women's basic function was to give life, those instances in which they took it were attributed to circumstances, such as spousal abuse or desperate poverty, that drove them to insanity); Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 994 (1995) ("The insanity defense was premised on the stereotypical belief that aggression and violence were unnatural in women.").

hysteria.<sup>306</sup> Yet, as I have shown above, male defendants relied on insanity theories, too, even in cases involving jealousy or alleged adultery. A key difference between men's and women's strategies was that women tended to obtain acquittals, whereas men were often convicted of murder despite raising an insanity defense.<sup>307</sup>

While insanity claims may have been a common means of defeating murder charges against female defendants in the American West and Australia,<sup>308</sup> the more remarkable finding is that justifiable homicide arguments also spared women who killed their batterers from conviction in both regions. Indeed, during the period covered by this Article, some women who killed male intimate partners could obtain acquittals without any mention of insanity at all. This was especially likely to occur if a brutal husband had attacked or threatened his wife in close proximity to being killed by her.

### *B. Confrontational Killings as Self-Defense*

Caroline Augusta Buckman fatally shot her abusive husband James on a ranch near Narrabri, New South Wales, on January 20, 1910.<sup>309</sup> The police arrested her when she turned herself in and surrendered a five-chambered revolver.<sup>310</sup> The district coroner committed her for trial in the Armidale Circuit Court,<sup>311</sup> and after being denied bail, Caroline entered a plea of not guilty.<sup>312</sup> According to the couple's daughter Gertie, Caroline had a "regular dog's life" with her husband.<sup>313</sup>

306. Coleborn, *supra* note 305, at 93; *see also, e.g.*, CARROLL SMITH-ROSENBERG, *The Hysterical Woman: Sex Roles and Role Conflict in Nineteenth-Century America*, in *DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA* 197, 215 (1985) (discussing parallels between symptoms of hysteria and aspects of middle-class women's role in the nineteenth century).

307. *See supra* text accompanying notes 238–49, 252–56, 292. A manslaughter "compromise" in which the jury returned a lesser-included offense conviction constituted a third but less typical outcome for both men and women who pleaded insanity. *See supra* note 250 (noting a "manslaughter compromise" in the case of Hispanic murder defendant, Loreto Robles, Jr.). For a comparable result when a woman stood trial, *see Wife Found Guilty of Killing Rancher*, L.A. TIMES, June 17, 1923, at 13.

308. *See, e.g.*, NSW Police Gazette, NRS 10958, Reel 3606, at 325, SRNSW (copy on file with author) (reporting that husband killer Sarah McDonald was committed to an asylum in New South Wales after being declared insane); *The Pacific Slope: Verdict, Jury Acquits Mrs. Drown*, L.A. TIMES, Apr. 1, 1914, at II9 (reporting that defendant Millie Drown was acquitted on insanity grounds, despite the prosecutor's theory that she killed her husband for his life insurance).

309. *See* NSW Police Gazette, NRS 10958, 1/3245, Reel 3597, at 61, SRNSW (copy on file with author).

310. Deposition of Patrick Scannell, Sergeant of Police, Coroner's Inquest at 4, *Rex v. Buckman*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7157 (1910, Armidale), SRNSW (copy on file with author).

311. NSW Police Gazette, *supra* note 309, at 61 (copy on file with author).

312. *See id.*; Coversheet, *Rex v. Buckman*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7157 (1910, Armidale), SRNSW (copy on file with author).

313. Deposition of Mary Gertrude Buckman, Coroner's Inquest at 30, *Rex v. Buckman*,

The deceased routinely beat her and their children; forced her to live in an old cart shed, instead of in the house with him; and brought another woman to his residence for sexual purposes.<sup>314</sup> In the decade prior to the killings, Caroline charged the deceased in police court with inflicting grievous bodily harm, and she also instigated lunacy proceedings against him when he mistreated one of their daughters.<sup>315</sup> She ultimately withdrew the assault charge and refused to testify in the latter case because “the wheat was falling off and there was no one to [harvest it].”<sup>316</sup>

The court before which James Buckman was summoned on the 1901 assault charge ordered him to sign an agreement to treat his wife and children “kindly and provide them with food[,] clothing[,] and necessities” and also to pay attorney’s fees.<sup>317</sup> But the violence did not stop. Acquaintances recalled that on various occasions James struck his wife with an axe handle and a switch, bit her hand, and forced her “under the bed to avoid the beating.”<sup>318</sup> Caroline’s children and several neighbors took her part in the 1909 lunacy case. Jesse McMahon stated, for example, that she “did not think that the deceased was a safe man to be left in a lonely place with wife and children.”<sup>319</sup> George Bates testified in these same proceedings because he feared the deceased would murder Caroline, whom he considered to be a “straightforward hard working woman.”<sup>320</sup> Despite evidence of James Buckman’s instability, the court discharged him.<sup>321</sup> The couple separated, and the wife worked at a dairy farm for almost a year to escape the husband’s

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Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7157 (1910, Armidale), SRNSW (copy on file with author).

314. *See id.* at 30–31.

315. *See id.*; *see also* Exhibits on Assault Case (Nov. 6, 1901) and Lunacy Proceedings (July 24, 1909), Rex v. Buckman, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7157 (1910, Armidale), SRNSW (copy on file with author).

316. Deposition of Mary Gertrude Buckman, Coroner’s Inquest at 32, Rex v. Buckman, *supra* note 313.

317. Exhibits on Assault Case (Nov. 6, 1901), Rex v. Buckman, *supra* note 315. However, the judge also required the couple to enter into a mutual agreement to keep the peace toward each other, which indicates that courts sometimes ignored conditions of dominance in favor of treating men and women as equally at fault. *Id.*

318. Deposition of William Renard, Coroner’s Inquest at 64, Rex v. Buckman, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7157 (1910, Armidale), SRNSW (copy on file with author); *see* Deposition of George Bates, Coroner’s Inquest at 62–63, Rex v. Buckman, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7157 (1910, Armidale), SRNSW (copy on file with author); Deposition of Jessie McMahon, Coroner’s Inquest at 61, Rex v. Buckman, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7157 (1910, Armidale), SRNSW (copy on file with author).

319. Deposition of Jessie McMahon, Coroner’s Inquest at 61, Rex v. Buckman, *supra* note 318.

320. Deposition of George Bates, Coroner’s Inquest at 62–63, Rex v. Buckman, *supra* note 318.

321. *See* Exhibit on Lunacy Proceedings, Rex v. Buckman, *supra* note 315.



unprovoked violence.<sup>322</sup> However, by 1910 she was back at the Mile and Tile Station near Narrabri.<sup>323</sup>

On the afternoon of the fatal shooting, Caroline argued with her husband about a horse and also about her tardiness in preparing dinner.<sup>324</sup> Thereafter, she cantered toward town on a route she selected to avoid meeting the deceased; yet, despite this precaution, James came after her “as hard as he could gallop” with a “mad wild look in his face.”<sup>325</sup> Caroline tried to race to a nearby rabbitier’s camp but ran into a tree branch and fell off her horse. The deceased’s steed jumped over her, stepping on her hand.<sup>326</sup> According to Caroline, the deceased then dismounted and grabbed a “great big stick.”<sup>327</sup> He left when she begged him not to hit her but later returned, announcing that he had come back with the intention of murdering her.<sup>328</sup> When James raised the stick over his head and brought it down with all his might, his wife drew a revolver and shot him in the chest. Caroline characterized her actions as self-defensive and further stated that she did not take exact aim.<sup>329</sup>

Despite this sympathetic story, some evidence pointed to a premeditated murder. Several deponents testified that Caroline Buckman carried a pistol and made death threats against her husband prior to the shooting, and the couple’s younger daughter said Caroline had a violent temper.<sup>330</sup> Furthermore, the physician who performed the postmortem exam on the deceased’s body thought it possible that the accused had fired the shot while she was on horseback, rather than lying injured on the ground. He believed the firearm was at some distance from the deceased because he

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322. See Deposition of Caroline Augusta Buckman, Coroner’s Inquest at 55, *Rex v. Buckman*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7157 (1910, Armidale), SRNSW (copy on file with author). According to a relative, Mr. Buckman paid his estranged wife some money for her support during this time. See Deposition of Robert Thomas Buckman, Coroner’s Inquest at 19, *Rex v. Buckman*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7157 (1910, Armidale), SRNSW (copy on file with author).

323. See Deposition of Caroline Augusta Buckman, Coroner’s Inquest at 44, *Rex v. Buckman*, *supra* note 322 (indicating that she resided at Mile and Tile at the time of the killing in 1910).

324. See *id.* at 47–48.

325. *Id.* at 49.

326. See *id.*

327. *Id.*

328. *Id.* at 49–50.

329. *Id.* at 50; see also Deposition of Simon Butler, Sub-Inspector of Police, Coroner’s Inquest at 6, *Rex v. Buckman*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7157 (1910, Armidale), SRNSW (copy on file with author) (confirming the nature of deceased’s wound).

330. See Depositions of Robert Thomas Buckman, Amy Ethel Buckman, and Ella Keegan, Coroner’s Inquest at 15, 27, 40–41, *Rex v. Buckman*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7157 (1910, Armidale), SRNSW (copy on file with author). But see Deposition of Mary Gertrude Buckman, Coroner’s Inquest at 65, *Rex v. Buckman*, *supra* note 313 (denying that defendant showed her boss’s daughter, Ella Keegan, a revolver and that defendant told either Ella or her that she would shoot Mr. Buckman).

did not observe any scorching of the deceased's shirt.<sup>331</sup> Nevertheless, while the evidence did not all favor Caroline Buckman, the trial jury ultimately acquitted her.<sup>332</sup> The jurors seem to have formed the same opinion as the Buckmans' neighbors, who considered James dangerous and thought "it was not to his credit to belt his wife."<sup>333</sup> Newspaper reporters described the tragedy as "a wife's fight for life"<sup>334</sup> and a "justifiable homicide."<sup>335</sup>

Two things are notable about Caroline Buckman's case and the others like it that resulted in acquittals. First, the facts (if construed according to the defendant's story) showed a confrontational situation in which the deceased posed a lethal threat to the accused. Second, the defendant's account was rendered credible because the jury was allowed to consider the context in which the killing occurred—an abusive marriage that the defendant tried to escape or make safer by appealing to neighbors, the police, or the courts.

The case of Bridget Waters, a California woman acquitted of murdering her husband in 1888,<sup>336</sup> provides another example of jury sympathy for a woman who ran out of nonviolent options. For Bridget, separation provided no safe haven. Her husband "not only beat and abused her, but [also] . . . followed her from place to place, and forced her to give him money whenever she had it."<sup>337</sup> When Bridget resided in Los Angeles, she learned that her husband Patrick had come to town and pleaded with an officer to arrest him. The policeman responded by going in search of Patrick;<sup>338</sup> yet, Patrick still showed up at Bridget's door and assaulted her.<sup>339</sup> He

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331. Deposition of Alexander John Park, Coroner's Inquest at 22–23, *Rex v. Buckman*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7157 (1910, Armidale), SRNSW (copy on file with author).

332. Supreme Court of Criminal Jurisdiction, Register of Criminal Indictments (1907–1919), 9/2635, Reel 1861 at 88, SRNSW (copy on file with author); Coversheet, *Rex v. Buckman*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7157 (1910, Armidale), SRNSW (copy on file with author).

333. Deposition of George Bates, Coroner's Inquest at 62, *Rex v. Buckman*, *supra* note 318.

334. *The Narrabri Tragedy: Inquest on the Victim*, ARGUS (Melbourne, Austl.), Feb. 4, 1910, at 7.

335. *Justifiable Homicide: Wife Shoots Husband*, ARGUS (Melbourne, Austl.), Apr. 29, 1910, at 6.

336. Verdict Form (filed June 6, 1888), *People v. Waters*, No. CR 000274, Superior Court of Los Angeles County, Cal., Los Angeles County Records Archive (copy on file with author).

337. *The Waters Case: Mrs. Waters Wants Her Husband Out of the Way*, L.A. TIMES, May 3, 1888, at 2. The *Times* further reported: "No less than eight times has he attempted to take her life in their two years of married life, and the constant dread upon her decided her to leave him." *Mrs. Waters: Takes a Shot at Her Fighting Hubby*, L.A. TIMES, May 2, 1888, at 2.

338. See Deposition of Officer H.W. Marden, Coroner's Inquisition, *People v. Waters*, No. CR 00274, Superior Court of Los Angeles County, Cal., Los Angeles County Records Archive (copy on file with author); *The Waters Case: Mrs. Waters Wants Her Husband Out of the Way*, *supra* note 337, at 2.

339. See Deposition of Daniel G. Fallon, Coroner's Inquisition, *People v. Waters*, No. CR 00274, Superior Court of Los Angeles County, Cal., Los Angeles County Records

was ejected by two men, but she encountered him again when she went to the store.<sup>340</sup> Bridget took the witness stand in her own defense and claimed her husband tried to shoot her, as he had done at least twice in the past.<sup>341</sup> Several residents of her boarding house corroborated her story,<sup>342</sup> and the jury acquitted her.

The press depicted Bridget Waters as an unattractive, older woman who used foul language and interjected inappropriate remarks from the witness stand,<sup>343</sup> so her acquittal could not have arisen from romantic notions about her. Rather, “[a] mass of testimony . . . tending to show that Waters had repeatedly threatened his wife”<sup>344</sup> provided a sympathetic context for the determination that she acted in self-defense. Evidence of the deceased’s past acts of violence was admissible because Bridget claimed he menaced her with a gun immediately before the shooting.<sup>345</sup> Patrick’s prior abuse gave her reasonable grounds to fear him;<sup>346</sup> hence, her

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Archive (copy on file with author).

340. See *id.*; *Mrs. Waters: The Second Day of Her Trial for Murder*, L.A. TIMES, June 5, 1888, at 2 (recounting the testimony of Police Chief Cuddy); *The Husband Killer: Mrs. Waters Tells Why She Killed Her Husband*, L.A. TIMES, June 6, 1888, at 3 (stating that James A. House testified to hearing gunshots shortly after Bridget Waters left his store on May 1, 1888); *The Murdered Husband*, L.A. TIMES, May 11, 1888, at 2 (reporting the testimony of Fallon, a butcher who did business with Mrs. Waters at her boarding house or restaurant and who helped eject her estranged husband after he “grabbed . . . and kicked her”).

341. See *Mrs. Waters: The Second Day of Her Trial for Murder*, *supra* note 340, at 2 (recounting the testimony of Police Chief Cuddy, who described the defendant’s story, and John Flynn and John Warrington, who claimed to have witnessed prior incidents in which Waters shot at his wife); *The Husband Killer: Mrs. Waters Tells Why She Killed Her Husband*, *supra* note 340, at 3 (reporting that the defendant accused the deceased of trying to kill her in Oakland, San Francisco, and at Lang’s Station).

342. See *Mrs. Waters: Takes a Shot at Her Fighting Hubby*, *supra* note 337, at 2; *The Husband Killer: Mrs. Waters Tells Why She Killed Her Husband*, *supra* note 340, at 3.

343. See *A Sad Scene: Mrs. Waters, the Husband Murderess Calls for Her Children*, L.A. TIMES, June 7, 1888, at 2 (“Mrs. Waters is a woman advanced in years and quite the reverse of handsome . . .”); see also *Mrs. Waters: The Second Day of Her Trial for Murder*, *supra* note 340, at 2 (“[B]oth the defendant and her deceased husband appear to have been a couple fond of interchanging complimentary language more vigorous than polite.”); *The Husband Killer: Mrs. Waters Tells Why She Killed Her Husband*, *supra* note 340, at 3 (“She proved a most valuable, and not altogether a satisfactory witness, interpolating remarks uncalled for by counsel, and damaging, rather than benefitting, her case.”).

344. *The Husband Killer: Mrs. Waters Tells Why She Killed Her Husband*, *supra* note 340, at 3.

345. See *People v. Edwards*, 41 Cal. 640, 643–44 (1871) (stating that the violent character of the deceased is admissible to show that the defendant had reasonable grounds to fear death or bodily harm if some fact transpired at the time of the killing indicating the “immediate purpose of the deceased toward the prisoner to be hostile, or at least equivocal, in its character”).

346. The trial court instructed the jurors that if Mrs. Waters “did not have reasonable grounds to believe that she was then in danger of receiving some serious harm or injury at the hands of her husband they should not acquit the defendant.” Instructions Asked by People and Given (filed June 4, 1888), *People v. Waters*, No. CR000274, Superior Court of Los Angeles County, Cal., Los Angeles County Records Archive (copy on file with author). A spirit of revenge arising from previous assaults on her by the deceased did not justify the

attorney had no need to depict her as insane. Based on testimony that the deceased had previously shot at Bridget,<sup>347</sup> the jury apparently believed he had attempted to do so again in the moments before she killed him. Under California law she had no duty to retreat,<sup>348</sup> and in any event, the *Waters* jury seems to have recognized that neither leaving one's spouse nor calling the police was always an effective solution.

Like the *Buckman* case in Australia, Bridget Waters's trial included allegations that the accused had issued death threats of her own.<sup>349</sup> But in both the *Waters* and *Buckman* cases, the verdict endorsed a self-defense theory, rather than the prosecution's charge of premeditated murder, and the homicide also generated publicity favorable to the defendant. The *Los Angeles Times* opined, for example, that the shooting of brutal Mr. Waters served as "a warning to married men who delight in beating their wives."<sup>350</sup>

### C. Hard Cases

#### 1. Allegedly Nonconfrontational Killings or Disproportionate Violence

Women who killed abusive intimate partners during a lull when they were not being attacked, or who seemed to respond disproportionately to a mild injury, proved more difficult to defend at trial. This difficulty arose from the firmly established requirements of self-defense—that the danger threatened must have been imminent and that the harm the defendant reasonably feared must have been that of death or great bodily injury.<sup>351</sup> If, in the eyes of the trial judge, the evidence

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defendant's homicidal act, but the jury was allowed to consider reasonableness from "the position of the defendant, seeing what she saw at the time, and knowing what she knew at the time." *Id.*; cf. *People v. Smith*, 214 P. 468, 473 (Cal. Dist. Ct. App. 1923) (holding that the jury was properly instructed that "evidence as to the character of the deceased should be considered as a circumstance in determining whether or not by his acts and conduct he gave the defendant reasonable ground to apprehend such danger as to justify her in shooting him").

347. See, e.g., *Mrs. Waters: The Second Day of Her Trial for Murder*, *supra* note 340, at 2 (reporting the testimony of John Flynn); *The Husband-Killer: Mrs. Waters Tells Why She Killed Her Husband*, *supra* note 340, at 3 (reporting the testimony of Carrie Anselmo).

348. *People v. Ye Park*, 62 Cal. 204, 208 (1882); see also FAIRALL, *supra* note 228, at 284 (noting that the law imposed no duty of retreat unless the defendant was the first aggressor in a fight). The manslaughter conviction of a young Indian woman in the 1920s was reversed because a California trial court erroneously instructed the jury that she had a duty to retreat from her knife-wielding male partner. *People v. Turner*, 269 P. 204, 206–07 (Cal. Dist. Ct. App. 1928).

349. See *Mrs. Waters: The Second Day of Her Trial for Murder*, *supra* note 340, at 2 (recounting the testimony of Ben Benjamin and John Lang).

350. *The Waters Case: Mrs. Waters Wants Her Husband Out of the Way*, *supra* note 337.

351. See FAIRALL, *supra* note 228, at 281. The trial judge in Bridget Waters's case instructed the jury: "Danger of death or great bodily harm must be imminent, present at the time, real or apparent and so urgent that there is no reasonable mode of escape except to take life." Instructions Asked by People and Given, *People v. Waters*, *supra* note 346. The Australian law of self-defense similarly required imminence and proportionality. According to the *Australian Magistrate* treatise, when a person is assaulted, "he may lawfully strike with a violence not exceeding that which appears necessary for the defence of the person."

did not show any hostile act by the deceased at the time of the killing, evidence of his past violence would be excluded or the jury would be instructed to disregard it.<sup>352</sup>

The case of Mary Silk, who hacked her husband to death with an adze in Victoria in 1884,<sup>353</sup> provides a poignant and disturbing example. Mrs. Silk raised claims of provocation and self-defense at trial,<sup>354</sup> alleging that prior to the homicide, her husband Jacob had made an incestuous sexual assault upon the couple's retarded fourteen-year-old daughter and that, during another incident, he had threatened to shoot the two women with a gun.<sup>355</sup> Pursued by Mr. Silk, "[t]hey escaped to the house of one of the witnesses . . . and were concealed there."<sup>356</sup> The girl corroborated her mother's story that the deceased again "took the gun and was going to shoot her" on the night of the homicide, but the jury apparently did not believe this.<sup>357</sup> There was evidence of a fight between Jacob Silk and another man at a local pub that evening,<sup>358</sup> so jurors may have thought Mr. Silk got the weapon to shoot his male foe, rather than to harm his wife and daughter.

The killing of Jacob Silk was especially violent. On the night of the homicide, the accused gave the deceased a glass of gin and then sent their daughter to the public house to get some whiskey.<sup>359</sup> After an absence of about twenty minutes, the daughter returned and saw her father lying on the floor face down in a pool of blood.<sup>360</sup> The girl testified that her father was not yet dead when she returned from the pub but that the defendant subsequently hit him seven times with the adze.<sup>361</sup> Citing the especially "barbarous way in which the deceased was struck," the judge opined that Mrs. Silk meant to make an example of her husband to deter their

WILKINSON ET AL. (1903), *supra* note 78, at 33.

352. See, e.g., *People v. Edwards*, 41 Cal. 640, 644 (1871) (holding that, when there was no altercation between the deceased and the prisoner at the time of the killing, "the character of the deceased, as being peaceable or otherwise, is of no import"); see *infra* notes 353–66 and accompanying text (discussing *Queen v. Silk*, in which an abusive husband's past acts of assault and incest were deemed to provide no legal justification for homicide).

353. See Testimony of Mary Ann Silk (the younger), Trial Transcript in *Queen v. Silk* at 2, Capital Case Files, Unit 11 (Silk, 1884), VPRS 264/P/0, PROV (copy on file with author) (describing the how the deceased was killed); Report on the Case of Mary Ann Silk by Judge William Stawell, Capital Case Files, Unit 11 (Silk, 1884), VPRS 264/P/0, PROV (copy on file with author) (describing the case and verdict).

354. See *Geelong Assize Court*, ARGUS (Melbourne, Austl.), Feb. 18, 1884, at 10 (noting the two defenses claimed).

355. See Report on the Case of Mary Ann Silk by Judge William Stawell, *supra* note 353 (copy on file with author) (describing the evidence at trial).

356. *Id.*

357. Testimony of Mary Ann Silk (the younger), Trial Transcript in *Queen v. Silk* at 5, *supra* note 353 (copy on file with author) (describing the evidence at trial).

358. See Testimony of Benjamin Latter and Edward Francone, Trial Transcript in *Queen v. Silk* at 7 & 9, Capital Case Files, Unit 11 (Silk, 1884), VPRS 264/P/0, PROV (copy on file with author) (describing the evidence at trial).

359. Report on the Case of Mary Ann Silk by Judge William Stawell, *supra* note 353 (copy on file with author).

360. *Id.*

361. See Testimony of Mary Ann Silk (the younger), Trial Transcript in *Queen v. Silk* at 2, *supra* note 353 (copy on file with author).

daughter from sexual misconduct.<sup>362</sup> Under his construction of the facts, the women—rather than the allegedly incestuous and brutal man—were to blame for the shocking events.

The jury convicted Mary Silk of Jacob's murder because, under the laws of both self-defense and provocation, too much time had passed between the deceased's threats and abuse of the women and his gruesome death.<sup>363</sup> However, the jury construed the facts in a light more sympathetic to Mrs. Silk than the trial judge, who thought the incest claim "was not proved."<sup>364</sup> Despite returning a capital verdict, the jury recommended mercy for the prisoner "on account of her husband's flagrant misconduct."<sup>365</sup> Mrs. Silk was sentenced to death, but the governor subsequently commuted her penalty to twenty years in prison.<sup>366</sup>

Women in the American West who killed their partners in nonconfrontational situations or in response to assaults that judges and juries considered relatively trivial also faced significant obstacles to acquittal. Coll-Peter Thrush and Robert Keller, Jr. provide a splendid analysis of a Washington murder trial involving a woman of the S'Klallam tribe who shot her husband, George Phillips, in 1878 after he beat her with an oar and threatened to kill her.<sup>367</sup> The defendant, Xwelas, claimed that she and Phillips struggled over the gun before it fired.<sup>368</sup> However, other evidence cast doubt on this self-defense theory by suggesting that Xwelas became angry over her husband's flirtation with another native woman and that she shot him stealthily from behind a screen of underbrush.<sup>369</sup> Given the poor fit between the conflicting evidence and the law of self-defense, sympathetic relatives and neighbors seemed inclined to excuse Xwelas on insanity grounds.<sup>370</sup> In the end, she was convicted of manslaughter, rather than murder, which Thrush and Keller describe as a lenient verdict, considering the formal law of self-defense.<sup>371</sup> The authors offer a variety of explanations for this outcome, including the ill repute of her husband—an alcoholic, wife-beating Welsh laborer—and community-wide

362. See Report on the Case of Mary Ann Silk by Judge William Stawell, *supra* note 353 (copy on file with author).

363. See *id.* (describing the jury's verdict and noting that "so much time intervened after [deceased's sexual] misconduct and the pursuit of his wife with a gun before any violence was inflicted by the prisoner as to preclude either being considered as any palliation at law"); see also Ramsey, *Provoking Change*, *supra* note 43, at 53–54 (referring briefly to the *Silk* case in a section on the historical background of the self-defense and provocation doctrines).

364. Report on the Case of Mary Ann Silk by Judge William Stawell, *supra* note 353 (copy on file with author).

365. See *id.*; see also Ramsey, *Provoking Change*, *supra* note 43, at 53–54 (noting the jury's recommendation of mercy).

366. Register of Decisions on Capital Sentences, 1851–1889, VPRS 7583/P0001/1, PROV (copy on file with author); see also Ramsey, *Provoking Change*, *supra* note 43, at 54 (noting the commutation).

367. Thrush & Keller, *supra* note 250, at 172–87.

368. See *id.* at 179.

369. See *id.* at 179, 181.

370. See *id.* at 179–82.

371. See *id.* at 182.

sympathy for Xwelas, who was pregnant and already the mother of five children at the time of the homicide.<sup>372</sup>

The early twentieth-century California case of Fay Alma Smith also highlights themes of violence, jealousy, and race and the difficulty of defending a woman whose case did not fit the paradigm constructed by self-defense law. Smith, a black woman, fatally shot her de facto husband, Arthur Bell, in 1922 after they got into a quarrel about his alleged attentions to other women.<sup>373</sup> Smith claimed that Bell had a history of beating her and that on the night of the homicide, he struck her with a bottle, “grabbed her by the throat . . . and started to pick up a chair to strike her.”<sup>374</sup> Affirming the conviction for second-degree murder, however, the appellate court focused on Smith’s failure to exhibit any physical injuries at the time of the shooting and concluded that the evidence against her sustained the verdict.<sup>375</sup> In the final analysis, the court adopted an unsympathetic view of Smith as a jealous woman who became enraged at her companion’s unfaithfulness. On appeal, she was held to have killed him without honestly believing “it was necessary to resort to such extreme means to defend herself against a threatened attack.”<sup>376</sup>

I will argue below that the conviction of female defendants who claimed self-defense was relatively rare in the American West for two reasons. First, as we have seen, women who killed their male partners during a moment of physical conflict could defend themselves as rational moral actors under traditional rules of evidence.<sup>377</sup> Second, as I will explain shortly, the “unwritten law” justifying female defense of honor in the late 1800s and early 1900s extended to self-defensive killings that did not fit comfortably within the confines of the formal doctrine.<sup>378</sup>

Why then was Fay Smith convicted of murder? Although courts sometimes treated women of color justly in self-defense cases,<sup>379</sup> both convicted women discussed here—Smith and Xwelas—faced trials suffused with racial undertones. Smith’s failure to attract sympathy stemmed from a complicated array of factors that collectively cast her as a fallen woman. Not only was she black, she was also (according to the court’s impression) pugnacious and immoral. Furious over her lover’s inconstancy, she had allegedly approached her female rival and threatened to kill her, as well as Bell.<sup>380</sup> Furthermore, because she was not Bell’s lawful, wedded wife, she acted “outside the protection of any right growing from a

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372. *See id.* at 181–83. Ultimately, their nuanced analysis emphasizes the desire of white men in the community to maintain peaceful relations with the Indians, to whom many were connected by marriage. *See id.*

373. *People v. Smith*, 214 P. 468, 469 (Cal. Dist. Ct. App. 1923).

374. *Id.* at 470.

375. *Id.* at 471.

376. *Id.* at 473.

377. *See supra* Part II.B.

378. *See infra* Part II.D.2.

379. *See, e.g., People v. Turner*, 269 P. 204, 204, 206–07 (Cal. Dist. Ct. App. 1928) (reversing the manslaughter conviction of a young Indian woman on the ground that the trial court erroneously instructed the jury she had a duty to retreat from the deceased’s assault); *cf. supra* note 250 (indicating that Xwelas’s Indian blood may have played a *mitigating* role in her case).

380. *Smith*, 214 P. at 471.

marriage relation [when] she renewed the dangerous discussion [of her lover's romantic dalliances] . . . , deliberately precipitat[ing] the quarrel" that resulted in his death.<sup>381</sup> In short, as the appellate court depicted her, Smith was not a pure icon of femininity whose tragic resort to deadly force could be blamed on a man's abuse of her.

## 2. Alleged Murders for Gain

A final category of "hard cases" that may have involved battered defendants were actually seen as easy cases at the time. In such cases, prosecutors charged women with murder under circumstances that indicated they desired to rid themselves of an inconvenient spouse for pecuniary gain or to pursue a sexual relationship with another man. The woman's lover often perpetrated the killing, and the prosecutor charged the female defendant with murder on a complicity theory or with being an accessory to the crime. The typical verdict in Australia and the American West was the same: *guilty*.<sup>382</sup> However, Australian women seem to have gotten harsher sentences than their counterparts on the western frontier of the United States.

In Australia, the relatively rare cases prosecuted as "murders for gain" led to conviction almost without exception, even when there was some evidence that the deceased had inflicted violence upon the female prisoner. For example, Elizabeth Scott went to the gallows in Victoria in 1863, along with co-defendants Julian Cross and David Gedge, for the murder of her husband, Robert.<sup>383</sup> When Robert turned up dead in his bed with a fatal bullet wound, Elizabeth was accused of having an illicit relationship with her lodger, Gedge.<sup>384</sup> Gedge accused Cross, a mixed-race cook who worked for the Scotts, and Cross confessed to the murder but also implicated the other two.<sup>385</sup> Elizabeth claimed to have been away from the house when the fatal shot was fired.<sup>386</sup>

Elizabeth's testimony revealed a history of distrust and violence in her marriage. She claimed the deceased was a jealous drunk.<sup>387</sup> However, although she also

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381. *Id.*

382. *But cf. supra* note 308 (noting the acquittal of Millie Drown in an alleged life-insurance murder).

383. *See* Register of Decisions on Capital Sentences, 1851–1889, VPRS 7583/P0001/1, PROV.

384. *See, e.g.,* Deposition of Elias Ellis, Coroner's Inquest at 11, Queen v. Scott, Case 2, Unit 261 (1863), Criminal Trial Briefs, VPRS 30/P/0, PROV (copy on file with author).

385. Deposition of Constable John Bruce, Coroner's Inquest at 28–33, Queen v. Scott, Case 2, Unit 261 (1863), Criminal Trial Briefs, VPRS 30/P/0, PROV (copy on file with author).

386. *See* Deposition of Elizabeth Scott, Coroner's Inquest at 8, Queen v. Scott, Case 2, Unit 261 (1863), Criminal Trial Briefs, VPRS 30/P/0, PROV (copy on file with author).

387. *See id.* at 7 (describing her husband's drinking problem); *see also* Deposition of Ellen Ellis, Coroner's Inquest at 15, Queen v. Scott, Case 2, Unit 261 (1863), Criminal Trial Briefs, VPRS 30/P/0, PROV (copy on file with author) (stating that Elizabeth told her about Robert Scott's extreme jealousy).



deposed that he sometimes assaulted her and recently threatened her life, she did not seem to view these incidents as particularly serious:

My husband when in liquor was quiet but he used to blow me up now and then *but nothing to signify* . . . during his late illness he has threatened to take my life but I never took any notice of it. There was always a pistol lying on the shelf within his reach, he was always drunk when he threatened to take my life and when he was sober he was always sorry for it.<sup>388</sup>

If these allegations were true,<sup>389</sup> she made a tragic error in failing to emphasize her past history of domestic abuse. Calling greater attention to it might have saved her from hanging, as it did Mary Silk. Instead, the narrative that prevailed at Elizabeth's trial and in the newspapers was that of a pretty adulteress with a vulgar sense of humor and a liking for drink, who "exhibited the utmost levity and apparent indifference to the death of her husband and to her own position [as a capital defendant]."<sup>390</sup> The police report stated: "She only appeared to be depressed in spirits but once, and that was on the morning that the prisoner Gedge left for Beechworth Gaol. She watched his departure and then had a long and hearty cry."<sup>391</sup>

The prosecution's successful depiction of the Scott murder as a means to facilitate an illicit sexual bond became the dominant script in other cases resulting in the execution or life-sentencing of Australian women. Subsequent versions of this narrative included the trial of Annie O'Brien, convicted of poisoning her de facto husband so she could run off with another man,<sup>392</sup> and Selina Sangal, a pregnant woman initially sentenced to hang for conspiring with a lover to kill her husband, Edward.<sup>393</sup> Both O'Brien and Sangal received life terms with hard labor after their death sentences were commuted.<sup>394</sup> Their cases had harsher outcomes

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388. Deposition of Elizabeth Scott, Coroner's Inquest at 8–9, *Queen v. Scott*, *supra* note 386 (emphasis added).

389. They were corroborated in part by a female neighbor. *See* Deposition of Ellen Ellis, Coroner's Inquest at 15, *Queen v. Scott*, *supra* note 387.

390. Report in re Prisoners Cross, Gedge & Scott Sentenced to Death, Unit 3 (Scott, 1863), Capital Case Files, VPRS 264/P/0, PROV (copy on file with author). Of Elizabeth Scott's fondness for ribald jokes, the police officer who drafted this report wrote: "She appeared to be very fond of any sly allusion to, or any joke on obscene topics, and if encouraged her conversation was more like that of a common streetwalker than of a proper woman." *Id.*

391. *Id.*

392. *See generally* Trial Transcript, Memorandum of Judge Hartley Williams, and Melbourne Police Department Letter Dated Aug. 26, 1892, Unit 1 (O'Brien, 1892), Capital Case Files, VPRS 1100/P/0, PROV (copy on file with author) (setting forth the evidence and outcome of the case).

393. *See* Memorandum of John Madden, Chief Justice of the Supreme Court of Victoria, Unit 3 (Tisler & Sangal, 1902), Capital Case Files, VPRS 1100/P/0, PROV (copy on file with author) (setting forth the evidence and outcome of the case).

394. *See* Register of Decisions of Capital Sentences, 1889–1944, VPRS 7583/P0001/2, PROV.

than those for women whose homicidal acts were deemed to have arisen from drunkenness or from the misconduct of their abusive husbands.<sup>395</sup> In the American West, the murder-for-gain theory also won guilty verdicts for the prosecution, but the charging and sentencing decisions in such cases tended to be more lenient than in Australia.<sup>396</sup>

*D. The “Unwritten Law” for Women in the American West*

In the United States, cultural understandings of women’s right to defend themselves against dishonor and mistreatment had two effects that gave abuse victims a greater likelihood of acquittal than in Australia. First, sympathy for wronged women charged with murder extended beyond cases in which the defendant suffered physical injury at the hands of her partner to scenarios involving seduction, abandonment, and emotional cruelty.<sup>397</sup> Second, in cases of physical abuse, courts and especially juries looked at a wider time frame around the killing and considered past abuse in assessing self-defense claims. The “unwritten law” thus became a safety net for women whose cases poorly fit the narrow parameters of the formal self-defense doctrine.<sup>398</sup>

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395. For instance, after Ann Hayes was convicted of murdering her husband in 1860, the townspeople of Sandhurst, Victoria, successfully petitioned for her death sentence to be reduced to fifteen years in prison because the killing “was the fatal result of a quarrel between the deceased and the Prisoner the latter being at the time in a state of intoxication.” Petition for Commutation of Sentence of Ann Hayes from the Inhabitants of Sandhurst, Unit 2 (Hayes, 1860), Capital Case Files, VPRS 264/P/0, PROV (copy on file with author); see Register of Decisions on Capital Sentences, 1851–1889, VPRS 7483/P0001/1 (recording Hayes’s commuted sentence); see also *supra* note 366 and accompanying text (noting that Mary Silk’s sentence for murdering her abusive husband was commuted to twenty years in prison).

396. The case of a California woman named Ella Amadon seems to have been typical. Amadon was charged and convicted of being an accessory to slaying her husband to reap his life insurance benefits. She received a five-year prison sentence for her crime in 1883, while the trigger man (her paramour) got a life term for first-degree murder. Amadon’s stay in San Quentin penitentiary was relatively lenient and brief, not only compared to her lover’s, but also in contrast to Elizabeth Scott’s hanging and the life terms Annie O’Brien and Selina Sangal received in Australia. See *The Courts*, L.A. TIMES, Nov. 28, 1883, at 4; *The Lesson of the Foster Trial*, L.A. TIMES, Nov. 16, 1883, at 2; *The Madon [sic] Murder*, L.A. TIMES, Nov. 20, 1883, at 4; *The Mysterious Murder*, L.A. TIMES, Sept. 27, 1883, at 4. Ella, her sister, brother, and lover were all charged with involvement in the crime. See *The Murder Case*, L.A. TIMES, Sept. 29, 1883, at 4.

397. This may provide an early analog to the modern concern that psychological abuse has an even more severe impact on its victims than physical abuse. See Joanne Belknap & Justin T. Denney, A Comparison of Physical and Non-Physical Intimate Partner Abuse Victimization 5 (unpublished manuscript) (copy on file with author).

398. See *infra* Part II.D.2.

## 1. Honor Killings by Women

Women whose honor had been sullied by men who jilted them, committed adultery, or caused myriad types of degradation routinely obtained acquittals.<sup>399</sup> Indeed, westerners joined other parts of the nation in recognizing an unwritten law that favored virtuous female defendants.<sup>400</sup> This unwritten law justified homicides perpetrated by a variety of wronged women, not exclusively those who had been physically abused. The *Los Angeles Times* stated in 1886: “The unwritten law in every American community which holds a woman guiltless who in the desperation of her sorrow, or in the face of a dishonored life, sheds the blood of her betrayer, is not dormant here.”<sup>401</sup> By contrast, I have not uncovered any honor-killing cases that led to acquittal in Australia.<sup>402</sup>

The unwritten law for women derived from a related theory of justification available to men.<sup>403</sup> The men’s version, which exonerated defendants who killed their wives’ lovers, particularly in the American South and West,<sup>404</sup> was already being challenged in judicial rulings by the late nineteenth century. For example, when Joe Hurtado slew his wife’s seducer in California in 1882, the judge refused to allow the defendant to introduce evidence of adultery to support his argument for acquittal.<sup>405</sup> According to the *Hurtado* trial court:

Our law does not make seduction an excuse for killing. Even if a man caught another in an adulterous act with his wife, it does not make it an excuse, and if he kills under the impulse of dishonor and in his rage, it reduces the crime only to manslaughter.<sup>406</sup>

399. See Ramsey, *Intimate Homicide*, *supra* note 30, at 118–25 (discussing the acquittal of “wronged” women whom juries deemed justified in killing “bad” men).

400. *Two Women: On Trial for Their Lives for Murder in California*, L.A. TIMES, Jan. 28, 1887, at 10 (discussing the unwritten law that held a woman guiltless for killing her betrayer); see *infra* notes 408–17 and accompanying text (discussing honor-killing cases in the American West); see also Marianne Constable, *Chicago Husband-Killing and the “New Unwritten Law,”* 124 TRIQUARTERLY 85 (2005) (discussing the unwritten law sparing women in Chicago); Ramsey, *Intimate Homicide*, *supra* note 30, at 118–25 (analyzing acquittals for female defendants in honor-killing cases in New York).

401. *Two Women: On Trial for Their Lives for Murder in California*, *supra* note 400, at 10.

402. In fact, in New South Wales in 1902, Ethel Herringe was convicted and imprisoned for fatally shooting her seducer, even though feminists at the time argued that she had defended her honor and that she was emotionally unhinged by being abandoned while pregnant with twins. Allen, *Policing Since 1880*, *supra* note 77, at 213.

403. See *supra* notes 245–46 and accompanying text.

404. See PETTEGREW, *supra* note 3, at 297–304; Martha Merrill Umphrey, *The Dialogics of Legal Meaning: Spectacular Trials, the Unwritten Law, and Narratives of Criminal Responsibility*, 33 LAW & SOC’Y REV. 393, 410–11 (1999); see also Ramsey, *Intimate Homicide*, *supra* note 30, at 145 n.224 (discussing the unwritten law for men accused of killing their wives’ paramours).

405. See *Adultery No Excuse for Murder*, L.A. TIMES, May 6, 1882, at 1.

406. *Id.* (paraphrasing the court’s reasoning). The trial court apparently *did* allow the

However, while the unwritten law for men was in decline in some parts of the West,<sup>407</sup> it persisted into the twentieth century as a means of justifying homicides that women perpetrated.

Classic honor killings by women involved pregnant wives or girlfriends whom the decedent left in the lurch. For instance, in 1915, a San Diego jury deliberated for less than half an hour before it acquitted Ruth Jaquith of murdering her spouse Walter. The accused was “in a delicate condition, [when she] shot her husband after he . . . declared he would leave her.”<sup>408</sup> The evidence showed not only that Walter had threatened to end their relationship, but also that he was a bigamist when they married.<sup>409</sup> Ruth claimed the fatal incident was an accident; according to her account, she merely intended frighten her husband.<sup>410</sup> Yet the cheering crowds of women who greeted her acquittal suggest that the verdict was viewed as a more fundamental triumph for feminine honor.<sup>411</sup> Unmarried women were also exonerated for avenging unfulfilled promises of marriage from men who had gotten them pregnant.<sup>412</sup>

Abandonment was not the only type of dishonor women might justifiably avenge. For instance, a prosecutor dismissed a murder case against Josephine Higgins in 1887, saying “he had no hope of convicting her” after a hung jury in her first trial.<sup>413</sup> Although Josephine described her husband’s death in an opium den as a suicide,<sup>414</sup> at least one witness claimed she had earlier confessed to stabbing him in a moment of homicidal jealousy.<sup>415</sup> Even under the latter version of the facts, some observers deemed the killing justifiable because the deceased had forced

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defendant’s wife to testify that she told him she was unfaithful, but it excluded evidence that might have shown the existence of an adulterous relationship between the wife and the deceased. *See People v. Hurtado*, 63 Cal. 288, 290–91 (1883). The court also declined to give several jury instructions requested by the defense regarding the seduction of Hurtado’s wife. The appellate bench affirmed these decisions, opining: “If defendant ‘believed deceased had seduced his wife’ (and retained the possession of his reason so as to be responsible for his act), the circumstance might furnish a motive for the crime, but it could not of itself tend to reduce the crime to murder of the second degree” because it would not negate premeditation. *Id.* at 296. Moreover, even if an oral report of adultery made the defendant *unreasonably* angry, the crime could not be reduced to manslaughter, which required provocation sufficient to arouse passion in a reasonable person. *Id.* at 292.

407. *But cf.* PETTEGREW, *supra* note 3, at 304 (noting that Texas did not repeal its paramour statute until 1973).

408. *Women Cheer Jury Verdict*, L.A. TIMES, Jan. 30, 1915, at II7; *see* Verdict Form (filed Jan. 29, 1915), *People v. Jaquith*, No. 22669, Old Civil and Criminal Cases, Microfilm Reel OCC 535, Old Records, Superior Court of San Diego County, Cal. (copy on file with author); Criminal Information (filed Jan. 14, 1915), *People v. Jaquith*, *supra* (copy on file with author).

409. *See Women Cheer Jury Verdict*, *supra* note 408.

410. *See id.*

411. *See id.*

412. *See, e.g., Ramsey, Intimate Homicide*, *supra* note 30, at 118–21 (discussing the case of Pasqualina Robertiello in late nineteenth-century New York).

413. *An Alleged Murderess Told to Go and Lead a Proper Life*, L.A. TIMES, Apr. 21, 1887, at 4.

414. *See Another Mysterious Murder*, L.A. TIMES, Sept. 15, 1886, at 1.

415. *See Murder or Suicide*, L.A. TIMES, Sept. 16, 1886, at 1.

Josephine into prostitution. According to the *Los Angeles Times*, the defendant was innocent under the unwritten law authorizing a woman to defend her honor.<sup>416</sup>

## 2. Killings Justified by Past Physical Abuse

A second application of the unwritten law supported self-defense claims by female defendants who did not clearly face an immediate threat of death or grievous bodily injury. As we have seen, such women were the hardest to defend in both the American West and Australia.<sup>417</sup> But the stronger culture of protectiveness toward women in the United States gave those who had killed abusive husbands or lovers an additional argument for exoneration. In 1910, for example, Mae Talbot faced a murder charge arising from the shooting of her gambler husband in Reno, Nevada.<sup>418</sup> Mae took the witness stand in her own defense and recounted a history of violence at the deceased's hands:

According to Mrs. Talbot her husband treated her in a brutal manner, often threatening to kill her and beating her horribly at times. On the night before the shooting, Mrs. Talbot stated that her husband gave her a fearful beating, kicking her and pulling her from her bed by the hair. Her condition was such as to necessitate the services of a physician.<sup>419</sup>

On the day of the fatal shooting, she and her husband met at an attorney's office to discuss their divorce settlement.<sup>420</sup> During this meeting, "an altercation ensued and Talbot struck her."<sup>421</sup> Mae then fatally shot him with a pistol that she carried in her muff.<sup>422</sup> In short, there was a confrontation in this case, but not one likely to be deemed life threatening unless the cumulative abuse of Mae Talbot was taken into account.

The formal doctrine of self-defense required that the defendant's lethal act be proportional to the harm she faced;<sup>423</sup> a simple assault did not justify homicide.<sup>424</sup> Following this clearly established law, the trial judge in the *Talbot* case gave

416. See *Two Women: On Trial for Their Lives for Murder in California*, *supra* note 400, at 10.

417. See *supra* Part II.C.1.

418. See *Didn't Know She Shot*, L.A. TIMES, Jan. 29, 1910, at I5.

419. *Id.*

420. See *id.*

421. *Id.*

422. *Id.*

423. 2 REVISED LAWS OF NEVADA § 6402 (1912) ("If a person kill another in self-defense, it must appear that the danger was so urgent and pressing, that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary . . . .") (current version at NEV. REV. STAT. § 200.200 (2009)); see *People v. Campbell*, 30 Cal. 312, 314 (1866) ("It is an elementary principle in criminal law that the person assaulted is justified in using so much force as is necessary to his defense. To repel a slight assault the person assaulted is not authorized to resort to measures of great violence.").

424. See *People v. Webster*, 109 P. 637, 639 (Cal. Dist. Ct. App., 1910) ("A simple assault would be an unlawful attack, yet it would not justify homicide."). This was true in Australia, too. See WILKINSON ET AL. (1894), *supra* note 79, at 36.

instructions requiring the defendant to have had a reasonable belief that “the danger was so urgent and pressing” as to make killing the assailant “absolutely necessary” to save her own life or prevent great bodily harm.<sup>425</sup> Yet he also reminded the jury that “under the laws of the State of Nevada a husband has no right to physically chastise his wife,” and he indicated that the gender of the defendant and the deceased could be taken into account.<sup>426</sup> “After a short deliberation[,] the jury returned a verdict of not guilty” in Mae’s case, thus suggesting it considered the past violence of the deceased relevant and exonerating.<sup>427</sup>

A decade later in San Diego County, California, Ruby Conley was acquitted of murder for fatally shooting her husband while he was restrained by a deputy sheriff who had responded to her wife-beating call.<sup>428</sup> Female defendants were thus found not guilty despite a lack of evidence of imminent danger, as the formal doctrine defined it, because the unwritten law allowed juries to place a self-defensive homicide in the context of a relationship in which the decedent had degraded, tormented, and often nearly killed the accused. Moreover, cultural norms played a role in shaping the law from the bench. Some judges, including the one who presided over Mae Talbot’s trial, even directed juries to consider gender and marital roles when hearing a self-defense claim.

Defense attorneys also invoked the unwritten law to bolster the justification of clients whose homicidal acts fit formal self-defense law better than Mae Talbot or Ruby Conley’s did. For instance, a California lawyer contended that the fatal shooting of George Bross in 1923 “was justifiable on account of the extreme

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425. Instructions Given, *State v. Talbot* (filed Feb. 1, 1910), No. 6954 (2d Jud. Dist. Ct. Nev.) (copy on file with author).

426. *Id.*

427. *Recalls Reno Shooting*, L.A. TIMES, Feb. 24, 1913, at 15 (noting Mae Talbot’s acquittal); see Verdict Form (filed Feb. 1, 1910), *State v. Talbot*, No. 6954 (2d Jud. Dist. Ct. Nev.) (copy on file with author). Murder cases in which the threat arguably did not appear immediate or grave sometimes resulted in acquittals in Colorado during the same time period, even in cases handled by less sympathetic judges. See, e.g., Ramsey, *Intimate Homicide*, *supra* note 30, at 125 (discussing the case of a Colorado woman who was acquitted in 1908 despite an instruction from the bench ordering the jury to disregard allegations that she had been insulted and brutalized by the deceased). In Colorado, however, nonconfrontational homicides and those that raised proportionality problems more often led to manslaughter verdicts. See *id.* at 135–36.

428. See Verdict Form (filed Jan. 19, 1922), *People v. Conley*, No. 36050, Old Civil and Criminal Cases, Microfilm Reel C-157, Old Records, Superior Court of San Diego County, Cal. (copy on file with author) (recording the acquittal); Criminal Information (filed Nov. 15, 1921), *People v. Conley*, *supra* (copy on file with author). Deputy Sheriff Oliver Sexson responded to the domestic violence call after San Diego police refused to help Ruby Conley, claiming she and her husband resided outside of the city limits. Ruby pleaded for law enforcement protection because her husband Walter had threatened to kill her. The deputy “subdued” Walter after first being attacked by him, and while he and a neighbor were walking Walter “up and down inside the garage, to sober him up,” Ruby Conley allegedly shot Walter twice through a window at close range. *Manufacturer Slain by Wife*, L.A. TIMES, Oct. 14, 1921, at 111. The District Attorney prosecuted Ruby for murder, even though a Coroner’s Jury deemed the killing to be justifiable homicide. *Mrs. Conley Exonerated by Jurors*, L.A. TIMES, Oct. 15, 1921, at 117.

cruelty . . . shown by the husband against his wife.”<sup>429</sup> Here, he referred to more than two-and-a-half years of beatings and other violence, including an incident in which George threw his wife over a forty-foot cliff.<sup>430</sup> Lillian shot George months later when he started choking her in an automobile.<sup>431</sup> However, under the prevailing norms in California at the time, she need not have cited an immediate attack to obtain exoneration.<sup>432</sup> Unless a female defendant had engaged in misconduct that made her irretrievably immoral in the jury’s eyes,<sup>433</sup> the deceased man’s cumulative acts of domestic terror sufficed for acquittal, or at the least manslaughter mitigation, in western American states during the period covered by this Article.

#### CONCLUSION

Many scholars contend that the government has systematically trivialized or ignored intimate-partner violence perpetrated by males.<sup>434</sup> Yet my research suggests that there is another side to the story—the sustained (but largely ineffectual) effort to police and civilize men by punishing violence against women. During the late 1800s and early 1900s, husbands were routinely arrested or summoned to court for beating their wives. But the dilemma of how to change the behavior of recidivist batterers whose frightened, socioeconomically dependent victims were reluctant to use the criminal courts contributed to an acknowledged failure of prevention. Thus, when women killed their abusive partners, their actions were often deemed wholly or partially justified. In contrast, juries usually convicted men of spousal murder. Such trends did not uniquely characterize frontier societies; indeed, they were borrowed from long-settled parts of the United States and England where ideals of respectable male behavior were more firmly entrenched.<sup>435</sup>

The chief difference between domestic violence cases in Australia and the American West was that, in Australia, men’s greater empathy with other men and discomfort with female encroachment on their prerogatives softened punishments for the battering and killing of women. It also made the conviction of female defendants somewhat more likely in Australia than in the United States. However, analysis of intimate-partner assaults and homicides in both regions demonstrates that it was not the stereotypically glorified masculine violence of the frontier, but

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429. *Bross Trial Is Ready for Jury*, L.A. TIMES, Apr. 14, 1923, at II17.

430. *See Tells Tale of Terrible Abuse*, L.A. TIMES, Dec. 31, 1922, at I12; *Widow Sobs Slaying Tale*, L.A. TIMES, Apr. 13, 1923, at I16.

431. *See Tells Tale of Terrible Abuse*, *supra* note 430, at I12.

432. Lillian Bross was acquitted of murder. Verdict Form (filed Apr. 23, 192), *People v. Bross*, No. CR 019369, Superior Court of Los Angeles County, Cal., Los Angeles County Records Archive (copy on file with author).

433. *See supra* notes 373–76, 379–81 and accompanying text (discussing the *Smith* case).

434. *See supra* notes 8, 12, 74 and accompanying text.

435. *See WIENER*, *supra* note 69, at 141–56, 164–65, 178–79, 188, 210, 222 (arguing that, in nineteenth-century England, male defendants charged with killing their wives became less successful at claiming provocation than in the past and more likely to be hanged or imprisoned for murder than female defendants); Ramsey, *Intimate Homicide*, *supra* note 30, at 118–56 (comparing similar trends in New York and Colorado).

the struggle for civilized statehood (or in the Australian context, civilized nationhood) that played the biggest role in the outcome of these cases.

This Article has shown that the home was less private in the late nineteenth and early twentieth centuries than most scholars assume. Even in frontier societies that displayed a high level of violence against women, police and courts tried to prevent the abuse of wives by imposing peace bonds, fines, and even prison time on their husbands. When domestic violence escalated to homicide, men faced murder convictions, while a woman's self-defensive killing of her abusive husband was often deemed justified because it was understood that a wife could not easily leave her marriage or rely on the courts to protect her. Whether a man who beat his wife was a criminal defendant or a homicide victim, he engaged in behavior that society and the state denounced as barbaric and unrespectable in the late 1800s and early 1900s.

Modern domestic violence policy is premised on the belief that, prior to the battered women's movement of the late twentieth century, Anglo-American societies experienced a long history of tolerance toward intimate-partner abuse. Hence, scholars and reformers today tend to see victim resistance to the aggressive policing and prosecution of batterers as a new dilemma. My historical research indicates, by contrast, that neither concern about intimate-partner violence, nor sensitivity to abused women's reluctance to prosecute, nor sympathy with their self-defensive use of deadly force, began with second-wave feminism. To be sure, the efforts of police, prosecutors, and criminal courts in the late 1800s and early 1900s to enforce the values of civilized manliness lacked the strong commitment to gender equality characteristic of modern reform campaigns. Nevertheless, at the end of the nineteenth century and the beginning of the twentieth, there was greater concern about intimate-partner violence, and corresponding state intervention in the family to punish such violence, than many scholars realize.